IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1508

FEDDERS CORPORATION,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

Petition (With Appendix) for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

SYDNEY B. WERTHEIMER
JEFFREY H. SCHNEIDER
Attorneys for Petitioner
425 Park Avenue
New York, N. Y. 10022

WEISMAN, CELLER, SPETT, MODLIN,
WERTHEIMER & SCHLESINGER
Of Counsel

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No.

FEDDERS CORPORATION,

Petitioner,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION (WITH APPENDIX) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Fedders Corporation ("Fedders"), prays that a writ of certiorari be issued to review the final judgment herein of the United States Court of Appeals for the Second Circuit (the "Court of Appeals").

Opinions Below

The opinion of the Court of Appeals, to date unreported, is reproduced in the Appendix (App. 69a). The

cease and desist order (the "Commission's Order") and the Opinion of the Commission, rendered by Commissioner Paul Rand Dixon are reproduced in the Appendix (App. 58a).

Jurisdiction

The judgment of the Court of Appeals herein was dated and entered on January 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the Court of Appeals erred in sustaining the Commission's Order insofar as it forbade a very broad spectrum of unlawful practices* which, Fedders submits, are not reasonably related to the single unlawful practice charged and proven**.

Statutory Provisions Involved

(a) Section 5 (a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), which reads as follows:

> "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

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* To wit, any false statement as to the air cooling, dehumidification, or circulation characteristics, capacity or capabilities of any air conditioner.

** To wit, that Fedders' air conditioners are the only ones that possess the characteristic known as "reserve cooling power" (it being conceded for purposes of this litigation that Fedders' air conditioners do possess that characteristic, although not uniquely).

(b) Section 5 (b) of the Federal Trade Commission Act, 15 U.S.C. 45 (b), which provides, in pertinent part, as follows:

> "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice."

Statement of the Case

The Commission's complaint as finally amended*, charged, and Fedders admitted, that Fedders had disseminated a claim that its air conditioners were unique

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* Reproduced at App. 1a; Fedders' answer to the complaint as finally amended is reproduced at App. 13a.

in that they possess a performance characteristic which other air conditioners do not possess, namely, "reserve cooling power". During the course of the hearing before the Administrative Law Judge, the parties stipulated that for all purposes "reserve cooling power" means "ability to function satisfactorily under conditions of extreme heat and humidity". That in fact Fedders' air conditioners do possess this characteristic was never challenged by the Commission.

It is beyond question that the above false claim of uniqueness of a single performance characteristic ("reserve cooling power") was the only offense charged and proved in this proceeding (see Finding of Fact 25, App. 36a). Commission counsels' briefs to the Commission and the Court of Appeals sought to establish that Fedders had admitted disseminating other types of false statements. The Court of Appeals, however, put this matter to rest as follows:

> "The administrative law judge put it somewhat confusedly when he said that '[Fedders] has admitted disseminating a false performance claim for its room air conditioners relating to the uniqueness of the ability of its room air conditioners to function satisfactorily at conditions of extreme heat and humidity'. [Fedders] made no such admission but rather admitted only false claims of uniqueness, *the only deceptions charged in the complaint.*" (Emphasis added.)*

All of the evidence submitted was in the form of written stipulations, joint exhibits or Fedders' exhibits received in evidence without objection. No witnesses were tendered by either side.

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* App. 75a-76a.

The salient provisions of the Commission's Order are three paragraphs numbered (1) through (3), respectively. Paragraph (1) thereof deals with representations concerning uniqueness. In effect it forbids Fedders from not only falsely claiming uniqueness of the "reserve cooling power" capabilities of its air conditioners but from falsely claiming that they are unique in *any* material respect.

Paragraph (2) of the Commission's Order insofar as pertinent, forbids Fedders from "making . . . any statement . . . as to the air cooling, dehumidification or circulation characteristics, capacity or capabilities of any air conditioner, unless at the time of such representation [Fedders] has a reasonable basis for such statement . . . which shall consist of competent scientific, engineering or other similar objective material or industry-wide standards based on such material."

Paragraph (3) of the Commission's Order, in effect, requires Fedders to maintain documentation in support of the objective basis, for each of its advertising claims required by paragraph (2) thereof.

Fedders did not and does not quarrel with paragraph (1) of the Commission's Order. It petitioned for the Court of Appeals' review of the Order, pursuant to 15 U.S.C. § 45 (c), on the ground that paragraphs (2) and (3) thereof cover a wide range of unlawful practices not reasonably related to the single unlawful practice (false claim of uniqueness of reserve cooling power) charged and proved, and on the second ground that the requirement in paragraph (2) of the Commission's Order that objective proof be adduced for all advertising claims covered by that paragraph, whether or not such claims were objective in nature, was improper.

The Court of Appeals unanimously affirmed the Commission's Order.*

Reasons for Granting the Writ

While it is elementary that in framing a cease and desist order, the Commission is not limited to prohibiting the offending conduct in the precise form in which it was found to have existed in the past (*F.T.C.* v. *Ruberoid Co.,* 343 U.S. 470 (1952)), and that the Commission has the power, within its discretion, to enjoin "like and related practices" (*F.T.C.* v. *Mandel Bros., Inc.,* 359 U.S. 385, 392-393 (1959)), it is abundantly clear that the Commission's discretion does not extend to enjoining conduct which "has no reasonable relationship to the unlawful practices found to exist." *Jacob Siegel Co.* v. *F.T.C.,* 327 U.S. 608 (1946), at 613. Expressed in somewhat different terms, the guiding principle is that:

> "[t]he order should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; . . ."

Royal Milling Co. v. *F.T.C.,* 288 U.S. 217 (1933) at 217.

At all stages of this proceeding to date, there was little difference between the contending briefs in respect to the basic legal principles governing the permissible scope of Commission orders; the dispute lay in the application of those principles.

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* With respect to the second ground of Fedders' objection to paragraphs (2) and (3), although the Court of Appeals did not grant Fedders' prayer to modify the Commission's Order so as to specifically negate any requirement for objective proof of a subjective claim, its opinion stated that the Order as framed does not require objective proof of subjective assertions. Hence Fedders does not further pursue this ground, there being no need to do so.

Fedders has painstakingly attempted to demonstrate to the Court of Appeals, and before that, to the Commission, that there is a marked difference in *kind* between, on the one hand, claiming, contrary to the fact, that a capability concededly possessed by an advertised product is possessed only by that product and, on the other hand, falsely claiming a capability which the advertiser's product does not possess at all; and, accordingly, that such widely different claims cannot be labeled as "reasonably related practices". At no time during the course of this matter has Fedders' position in this respect, which is critical to a determination of the permissible breadth of the Commission's Order, been controverted other than by broad-brush superficial analysis.

On this crucial point the Court of Appeals simply deferred to the expertise of the Commission as follows:

> ". . . as the Commission held, . . . the claim of uniqueness in having 'reserve cooling power' was also a performance claim by implication. 'Uniqueness,' as the Commission footnoted, 'is obviouly both an attribute in itself and one facet of broader categories of product characteristics, such as price, performance and warranty terms'.
>
> "As to this finding, that the uniqueness claim as to reserve cooling power implies to consumers a claim of high cooling performance in extreme conditions of heat and humidity, we are in the very realm of the Commission's greatest expertise—what constitutes deception in advertising. . . . On the basis of this finding of implicit misrepresentation the remedial order appears sound as reasonably related thereto." (App. 76a)

What the Court of Appeals appears to be saying is that when Fedders claimed the uniqueness of the "reserve

cooling power" capability of its air conditioners, it necessarily, *ipso facto,* also claimed that its air conditioners provide high cooling performance in extreme conditions of heat and humidity, and that, accordingly, if the assertion of uniqueness is false, the falsity of the high cooling performance claim must also follow.

However, as heretofore stated,* the reserve cooling power capability of Fedders' air conditioners and their consequent "ability to function satisfactorily under conditions of extreme heat and humidity"** have never been challenged. Accordingly, it is plain that the nexus which the Court of Appeals found between a false uniqueness claim and a false claim as to the underlying characteristics, sufficient in the Court's opinion for them to be deemed "reasonably related" practices, lacks any real substance. The only misrepresentation by Fedders was its *explicit* claim that its air conditioners were the only ones possessing reserve cooling power. No *implicit* misrepresentation can be found therein with respect to the cooling performance of Fedders' air conditioners for the simple reason that their ability to cool satisfactorily even under extreme heat and humidity conditions has at all times been conceded.

What is meant by "reasonably related" has been articulated in terms of whether the conduct prohibited by a cease and desist order, insofar as it goes beyond the actual unlawful conduct proved, is merely a "variation on the basic theme."***

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* See page 4 *supra.*

** The stipulated meaning of the term "reserve cooling power" (see page 4 *supra*).

*** *Country Tweeds, Inc.* v. *F.T.C.,* 326 F.2d 144 (2d Cir. 1964); *Vanity Fair Paper Mills, Inc.* v. *F.T.C.,* 311 F.2d 480 (2d Cir. 1962).

Utilizing this "basic theme" approach, the necessary starting point is the determination of the essence of the unlawful conduct. Consider the following example of Fedders' uniqueness advertisement:

"Only Fedders has reserve cooling power"

Since the only misrepresentation is the italicized portion of this statement (the reserve cooling power capability of Fedders' equipment being unchallenged as aforesaid), it is the claim of uniqueness that constitutes the essence or "basic theme" of the misrepresentation. Consequently, any extension of the coverage of the order beyond the specific wrong proved (false uniqueness claim as to reserve cooling power) must flow from its basic "uniqueness" theme. Such an extension was effected by paragraph 1 of the Commission's Order, which forbade uniqueness claims false "in any material respect". Fedders does not challenge this extension. However, paragraph 2 of the Commission's Order shifts the focal point to the performance characteristic itself, having nothing to do with "uniqueness" and, therefore, having nothing to do with the actual wrong committed. Accordingly, Fedders does challenge this provision. It is not a "variation on the basic theme" but, rather, creates an altogether new theme.

The difference between claiming an attribute for a product which it in fact does not possess and claiming that your product is the only one possessing that attribute when in fact other products possess it as well involves more than a semantic difference. There is also a broad difference in practical effect between the two assertions.

Let us suppose that a consumer is induced to purchase an air conditioner by an advertisement claiming that the product has reserve cooling power. If the assertion is

false and, accordingly, the unit stops functioning during a spell of unusually hot weather, the consumer is completely frustrated. Relying on a representation which turned out to be false, he has bought a piece of machinery which failed him when he needed it most. But suppose, on the other hand, that the same consumer purchases an air conditioner in reliance upon a representation that it is the only one that has reserve cooling power and suppose, further that the air conditioner does have this capability (although not uniquely) and, accordingly, that it functions adequately during the same hot spell. The consumer is hurt, if at all, only to the extent, if any, that the price of the unit he bought exceeds the price of a comparable unit of another manufacturer also possessing reserve cooling power. Despite the misrepresentation, he would have received substantially what he bargained for—a unit that operates satisfactorily during unusually hot weather.

The Commission's Order encompasses within its scope substantially all of the capabilities which are of primary interest to a prospective purchaser of an air conditioner; mainly, the performance of the unit in terms of its ability to cool air, and to circulate and humidify it in the course of doing so. And yet, the Commission's Order was issued,

(i) against a company whose prior record with the Commission is unblemished;

(ii) against a company which, long prior to the issuance of the complaint herein, discontinued the offending practice*; and

* It is undisputed that on December 22, 1971, Fedders discontinued, and did not resume, any reference to reserve cooling power, in its advertising, whether coupled with the uniqueness claim or by itself. (Initial Decision, p. 23, 1st para., App. 42a). The complaint was issued on June 11, 1973.

(iii) in response to a single unlawful practice of Fedders, to wit: the claim that Fedders' air conditioners were unique in possessing a characteristic known as "reserve cooling power" when, in fact, other air conditioners also possessed that characteristic, which, when viewed in the context of Fedders' general advertising program, comprised a relatively insignificant portion of that program.

It is undisputed that the challenged advertisements taken in a sample area and during a sample period of time*, in terms of their cost, constituted only about 7/10 of 1% of Fedders' total advertising expenditures** and that they were not, unlike the "stops 25% faster" claim in *Firestone Tire and Rubber Co.*, 481 F.2d 246 (6th Cir. 1973), *cert. den.*, 414 U.S. 1112 (1973), or the sensational "shave the sandpaper" television commercial which was the subject matter of *F.T.C.* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965), the dominant theme in a broad-based and intensive advertising campaign.

Furthermore, the Commission found that in the majority of instances the unique reserve cooling power claim was not featured or otherwise emphasized in the offending advertisements***. To the contrary, it was usually

* Pursuant to the Administrative Law Judge's suggestion the parties stipulated information provided by Fedders as to the challenged advertisements with respect to a sample area which included the Florida area, the Washington, D.C. metropolitan area, the Philadelphia metropolitan area and the New York metropolitan area, for its fiscal years ending August 31, 1970 and August 31, 1971, respectively.

** Finding of Fact 18, App. 31a.

*** Finding of Fact 20, App. 34a.

"buried" in small type among a considerable number of other claims.*

The Commission could hardly have promulgated a more sweeping order had Fedders committed a broad range of unlawful practices, which, it obviously did not. Though Fedders' single wrongful practice is no less wrongful because of the above-discussed mitigating factors, their presence makes the Commission's Order that much more difficult to justify.

While we are mindful of this Court's observation that "those caught violating the Act must expect some fencing in", *F.T.C.* v. *National Lead Co.*, 352 U.S. 419 (1957) at 431, we respectfully submit that in the present instance the Commission has seen fit to erect a fence of monumental proportions around a violation which is not only narrow in scope but which cannot by any reasonable standards be deemed flagrant.

Diligent research by counsel has failed to reveal any decisions of this Court which provide guideposts for determining the permissible outer boundaries of the Commission's "fencing in", other than the broad generalizations of "like and related practices", "reasonable relatedness to the unlawful practices", and "reasonably necessary to correct the evil", language set forth in *Ruberoid, Mandel Bros.* and *Siegel, supra.* Since this Court, insofar as known to counsel, has never narrowed a Commission advertising order for over-breadth, it has never had occasion to indicate, in any more than the above general terms, what the outer "fencing limits" are.

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* Copies of those of the offending advertisements as appeared in the five media of largest circulation in the sample area, are set forth at App. 79a. Copies of these advertisements, as well as copies of all of the other offending advertisements which appeared in the sample area during the sample period, were received in evidence, without objection, as Respondent's Exhibit 1 before the Commission.

Fedders respectfully submits that, under the circumstances here presented, this Court by narrowing the Commission's Order, as urged by Fedders, to embrace false claims as to the uniqueness of Fedders' products in any respect, would, and should, firmly establish that the teaching of *Royal Milling, supra* that "[t]he order should go no further than is reasonably necessary to correct the evil . . ." is meaningful, and that the Commission's "expertise" is not necessarily the controlling factor in determining the scope of an order, and that in an appropriate case this Court will not hesitate to cut down the scope of an order where the Commission has plainly gone too far.

CONCLUSION

For the foregoing reasons, Fedders prays that this Court issue a writ of certiorari to review the judgment and decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

SYDNEY B. WERTHEIMER
JEFFREY H. SCHNEIDER
Attorneys for Petitioner

WEISMAN, CELLER, SPETT, MODLIN,
WERTHEIMER & SCHLESINGER
Of Counsel

APPENDIX.

Complaint.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

IN THE MATTER

of

FEDDERS CORPORATION, a corporation.

Docket No. 8932

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Fedders Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent Fedders Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at Edison, New Jersey.

PARAGRAPH TWO: Respondent Fedders Corporation is now and has been engaged in the advertising, offering for sale, sale and distribution of Fedders air conditioners, including Fedders Model ACL20E34X Room Air Conditioners (hereinafter referred to as Fedders ACL room air conditioners).

PARAGRAPH THREE: In the course and conduct of its aforesaid business, respondent Fedders Corporation now causes and has caused its air conditioners, when sold, to

be transported from its place of business in the State of New Jersey to purchasers thereof located in various states of the United States, and in the District of Columbia. Respondent Fedders Corporation therefore maintains, and at all times mentioned herein has maintained, a substantial course of trade in said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH FOUR: In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Fedders Corporation has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent.

PARAGRAPH FIVE: In the course and conduct of its business as aforesaid, and for the purpose of inducing the sale of the said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has disseminated, and caused to be disseminated, certain advertisements of said ACL room air conditioners, including but not limited to, advertisements printed in newspapers located in various states of the United States and in the District of Columbia, which newspapers are disseminated across states lines.

PARAGRAPH SIX: Typical of the statements and representations contained in said advertisements, but not all inclusive thereof, is the following segment of the print advertisement for Fedders ACL room air conditioners:

> RESERVE Cooling Power—only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days.

PARAGRAPH SEVEN: By and through the use of the aforesaid statements and representations, respondent has

represented, directly or by implication, that reserve cooling power is a unique feature of Fedders home air conditioners, not found in other air conditioners.

PARAGRAPH EIGHT: In truth and in fact, "reserve cooling power," referring to an increased cooling capacity at high loading conditions, is not a unique feature of Fedders ACL room air conditioners. In fact, comparable air conditioners made by other companies provide an increase in cooling capacity at high loading conditions.

Therefore, the statements and representations referred to in Paragraphs Six and Seven were and are false, misleading, and deceptive, and the advertisements referred to in Paragraphs Five, Six, and Seven were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PARAGRAPH NINE: By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that Fedders ACL room air conditioners, compared with other room air conditioners, had a significantly increased cooling capacity at high loading conditions under customary conditions of use.

PARAGRAPH TEN: In truth and in fact, at the time the aforesaid statements and representations were made, respondent had no reasonable basis from which to conclude that Fedders ACL room air conditioners, compared with other room air conditioners, had a significantly increased cooling capacity at high loading conditions under customary conditions of use.

Therefore, the statements and representations referred to in Paragraphs Six, Nine, and Ten were and are false, misleading and deceptive, and the advertisements referred to in Paragraphs Five and Six were and are unfair or

deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PARAGRAPH ELEVEN: By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that Fedders ACL home air conditioners, compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use. At the time said statements and representations were made, respondent had no reasonable basis from which to conclude that such was the fact.

Therefore, the statements and representations referred to in Paragraphs Six and Eleven were and are false, misleading and deceptive, and the advertisements referred to in Paragraphs Five and Six were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PARAGRAPH TWELVE: The use by respondent of the aforesaid unfair or deceptive acts or practices has had, and now has, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

PARAGRAPH THIRTEEN: The aforesaid acts or practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 11th day of June A. D., 1973 issues its complaint against said respondent.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 2nd day of August A. D. 1973, at 10:00 o'clock is hereby fixed as the time and 1101 Building, 11th & Pa. Avenue, N. W., Washington, D. C. as the place when and where a hearing will be had before an administrative law judge the Federal Trade Commossion, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. Answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the administrative law judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under

Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the administrative law judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to Fedders Corporation might be inadequate fully to protect the consuming public or the competitive conditions of the air conditioning industry, the Commission may order such other relief as it finds necessary or appropriate.

ORDER

I

It is ordered that respondent Fedders Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of the respective products hereinafter referred to, do forthwith cease and desist from:

1. representing, directly or by implication, that an increase in cooling capacity at high loading conditions of Fedders room air conditioners is a unique feature of such air conditioners;

2. representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any other material respect, unless such is the fact;

3. representing directly or by implication, that Fedders room air conditioners, compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions of use, unless at the time such representation is made, respondent has a reasonable basis for such representation, which may consist of competent scientific, engineering, or other similar objective material, or industry-wide standards based on such material.

4. making, directly or indirectly, any other statement or representation in any advertising or sales promotional material as to the performance characteristics of any Fedders air conditioner, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which may consist of competent scientific, engineering, or other similar objective material, or industry-wide standards based on such material.

5. failing to maintain and produce accurate records which may be inspected by Commission staff members upon reasonable notice:

   (a) which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, insofar as the text of such claim is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising agency en-

gaged for such purpose by respondent or by any such division or subsidiary, which claim concerns the performance characteristics of, or the uniqueness of any feature of, any Fedders air conditioning product or system; and

(b) which provided the basis upon which respondent relied as of the time the claim was made; and

(c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

The provisions of paragraph 5 shall be in effect for a period of ten (10) years from the date this order becomes final.

IT IS FURTHER ORDERED that respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation or placement of advertisements.

IT IS FURTHER ORDERED that respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiaries engaged in the manufacture and/or sale in commerce of air conditioning products or systems, or any other changes in the corporation which may materially affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days and at the end of six (6) months after the effective date of the order served upon it, file with

the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with the order to cease and desist.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 11th day of June A. D., 1973.

By the Commission.

CHARLES A. TOBIN,
Secretary.

(Seal.)

Order Amending Complaint.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

[SAME TITLE.]

By motion filed August 27, 1973, complaint counsel has moved to amend the complaint herein to correct a typographical error in respect to the model number of the air conditioner set forth in the complaint. Complaint counsel's motion would change the model number of the room air conditioner set forth in Paragraph Two of the complaint from ACL20E3DX to ACL20E3EX. The undersigned has been advised that respondent's counsel has no objection to the proposed amendment to the complaint.

Accordingly,

IT IS ORDERED that the complaint herein be, and it hereby is, amended as follows:

(1) Paragraph Two, line four, change Model ACL20-E3DX to Model ACL20E3EX; and

(2) Paragraphs Five-Six, Eight-Eleven, to the extent they incorporate by reference the model number designation in Paragraph Two, are amended to agree with Paragraph Two, as amended.

s/ ERNEST G. BARNES,
Administrative Law Judge.

September 5, 1973

Order Further Amending Complaint.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

[SAME TITLE.]

At a prehearing conference held herein on November 30, 1973, the undersigned orally on the record made several amendments to the complaint (Tr. 43, 48-49, 74). Since prehearing conferences are not public unless all parties agree otherwise (Section 3.21[c] of the Rules of Practice), the record of this prehearing conference is nonpublic. It is appropriate that a formal order issue amending the complaint so that the public record will reflect the amendments to the complaint, which have heretofore been made. Accordingly,

IT IS ORDERED that the complaint herein be, and it hereby is, amended as follows:

(1) Paragraph Two: Line 3, change "Fedders air conditioners" to "Fedders room air conditioners"; lines 4 and 5, place period after "Room Air Conditioners" and delete all language enclosed in parentheses.

(2) Paragraph Five: Line 6, delete "ACL".

(3) Paragraph Six: Line 4, delete "ACL".

(4) Paragraph Seven: Line 4, substitute "room" for "home"; line 5, insert "room" after "other".

(5) Paragraph Eight: Line 3, delete "ACL"; line 4, insert "room" after "comparable".

(6) Paragraph Nine: Line 5, delete "ACL"; line 6, insert "all" after "with".

(7) Paragraph Ten: Line 3, delete "ACL"; line 4, insert "all" after "with".

Order Further Amending Complaint

(8) Paragraph Eleven: Line 3, delete "ACL", substitute "room" for "home"; line 4, insert "all" after "with".

Respondent filed an Answer To Further Amended Complaint on December 28, 1973. It is the undersigned's understanding that respondent's answer was in response to the complaint, as orally amended on the record at the prehearing conference of November 30, 1973. Respondent's amended answer therefore took into consideration the amendments to the complaint which are made hereinabove. However, in order that there be no misunderstanding, respondent is hereby given until January 21, 1974 to file any amended answer which respondent may deem necessary because of the complaint amendments made herein. Accordingly,

IT IS FURTHER ORDERED that respondent be, and it hereby is, given until January 21, 1974 to file a further amended answer if desired.

January 10, 1974

s/ ERNEST G. BARNES,
Administrative Law Judge.

Answer to Further Amended Complaint.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

[SAME TITLE.]

Respondent, as and for its answer to the complaint herein, as amended to the date hereof:

1. Admits Paragraph ONE, Paragraph TWO, Paragraph THREE, Paragraph FOUR and Paragraph FIVE.

2. As to Paragraph SIX, admits that the statement beginning with the word "RESERVE" and ending with the word "days" set forth in Paragraph SIX was contained in advertisements disseminated by respondent, and except as admitted as aforesaid, denies each and every fact alleged in Paragraph SIX.

3. As to Paragraph SEVEN, admits that by the use of the statements specifically set forth in Paragraph SIX of the complaint, respondent represented, directly or by implication, that reserve cooling power is a unique feature of Fedders room air conditioners; but avers that the aforesaid representation of uniqueness of reserve cooling power was so infrequently made and constituted so small a percentage of respondent's advertising expenditures that its impact upon the purchasing public was insignificant, and except as admitted and averred as aforesaid, denies each and every fact alleged in Paragraph SEVEN.

4. As to Paragraph EIGHT (which consists of two paragraphs, the second of which is not numbered), admits that "reserve cooling power", referring to ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners and that comparable room air conditioners made by some other companies have such ability and

feature, and, except as admitted as aforesaid, denies each and every other fact alleged in Paragraph EIGHT.

5. As to Paragraphs NINE, TEN and ELEVEN, admits that by the use of the statement specifically set forth in Paragraph SIX of the complaint, respondent represented, by implication, that at the time the aforesaid statement was made respondent had a reasonable basis from which to conclude that Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity, further admits that at the time said statement was made respondent had no reasonable basis for such conclusion; repeats and realleges the averment set forth as part of Paragraph "3" of the within answer, and, except as admitted and averred as aforesaid, denies each and every fact alleged in Paragraphs NINE, TEN and ELEVEN, including, without limitation, those alleged in the unnumbered second paragraphs of Paragraphs TEN and ELEVEN.

6. Denies each and every fact alleged in Paragraph TWELVE and Paragraph THIRTEEN.

AS AND FOR AN AFFIRMATIVE DEFENSE

7. Respondent, in good faith, many months prior to the issuance of notice by the Commission of a proposed adjudicative proceeding against respondent in respect to the facts alleged in the complaint, ceased disseminating all advertising material relating to "reserve cooling power" and has not since resumed the dissemination of any such material.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

8. The relief sought by the Commission, as set forth in the form of proposed order attached to the complaint, is unjustifiably broad in its scope.

AS AND FOR MITIGATING CIRCUMSTANCES WHICH, IF THE CHARGES ALLEGED IN THE COMPLAINT ARE SUSTAINED, MUST BE CONSIDERED IN FRAMING ANY ORDER ENTERED HEREIN

9. Respondent repeats and realleges the allegations of Paragraph "8" hereof with the same force and effect as if set forth at length hereat.

10. The only advertising claim of respondent alleged herein to have been false, misleading or deceptive is the claim of uniqueness of the "reserve cooling power" feature of its air conditioners. This claim was one of approximately ten advertising claims made by respondent as to which respondent, by order of the Commission, was required, on or about October 13, 1973 to furnish supporting material. Respondent duly furnished such material in response to all of the other advertising claims above referred to, and none of such other claims has been challenged by the Commission.

December 24, 1973

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER
Attorneys for Respondent Fedders Corporation
Office & P. O. Address
New York, New York 10022
By /s/ SYDNEY B. WERTHEIMER
A Partner of the Firm

Initial Decision, Dated July 15, 1974.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

[SAME TITLE.]

Initial Decision

By Ernest G. Barnes, Administrative Law Judge.

Heidi P. Sanchez, Esquire,
Paul G. Foldes, Esquire
for the Commission.

Sydney B. Wertheimer, Esquire,
Weisman, Celler, Spett, Modlin &
Wertheimer,
New York, N. Y.,
Attorney for Respondent.

Preliminary Statement

Respondent Fedders Corporation, a corporation, is charged with violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45). The complaint issued by the Commission on June 11, 1973, alleges that respondent, in connection with the advertising, offering for sale, sale and distribution of its room air conditioners to purchasers thereof, has represented, directly or by implication, through statements and representations in advertisements placed in newspapers of interstate circulation, that "reserve cooling power" (hereinafter sometimes referred to as "RCP") is a unique feature of its room air conditioners, not found in other room air conditioners. However, in truth and in fact, the complaint alleges, RCP, referring to an increased cooling capacity at high loading conditions, is not a unique feature of Fedders room air conditioners, but that, in fact, comparable room air conditioners made by other companies provide an increase in cooling capacity at high loading conditions.

The complaint further alleges that respondent has also represented that, at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that the Fedders room air conditioners, compared with other room air conditioners, had a significantly increased cooling capacity at high loading conditions under customary conditions of use. In truth and in fact, the complaint alleges, at the time the said statements and representations were made, respondent had no reasonable basis for such statements and representations.

The complaint also alleges that by and through the use of the aforesaid statements and representations in respect to RCP, respondent has represented, directly or by implication, that the Fedders room air conditioners, compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use. At the time said statements and representations were made, the complaint alleges, respondent had no reasonable basis from which to conclude that such was the fact.

In brief, the complaint alleges that respondent has (1) made a uniqueness claim for its room air conditioners when such is not a fact, (2) has represented that it had a reasonable basis for making a uniqueness claim for its room air conditioners when it had no reasonable basis for making such a claim, and (3) has represented that its room air conditioners, when compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary con-

ditions of use when it had no reasonable basis from which to conclude that such was the fact.

The above practices are alleged to have the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of said products by reason of such erroneous and mistaken belief. The said practices are alleged to be false, misleading and deceptive, and constitute unfair methods of competition and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Respondent's Answer, filed August 14, 1973, generally admitted the practices alleged in the complaint, but denied that such conduct was unlawful. Respondent also interposed an affirmative defense, asserting that respondent, "in good faith, many months prior to the issuance of notice by the Commission of a proposed adjudicative proceeding against respondent in respect to the facts alleged in the complaint, ceased disseminating all advertising material relating to 'reserve cooling power' and has not since resumed the dissemination of any such material." Respondent's Answer also alleges "as and for mitigating circumstances . . . in framing any order" that its claim as to the uniqueness of the RCP feature of its room air conditioners is the only advertising claim of respondent alleged in the complaint to be false, misleading or deceptive, and was one of approximately ten advertising claims made by respondent as to which it was required, by Commission Order of October 13, 1971, to furnish supporting material. Respondent's Answer asserts that it "duly furnished such material in response to all the other advertising claims above referred to, and none of such other claims has been challenged by the Commission."

Thereafter, on August 17, 1973, complaint counsel filed a Motion To Strike Affirmative Defenses on the grounds that they are without merit, do not constitute an affirmative defense, and are appropriately denials. On August 24, 1973, Motion Of Complaint Counsel For Summary Decision was filed.

At a prehearing conference held on August 27, 1973, it was agreed that complaint counsel would file a motion to amend the complaint, and on that date Motion Of Complaint Counsel To Amend Complaint And To Amend Motion For Summary Decision was filed. Thereafter, on September 6, 1973, the undersigned issued an order granting an extension of time until September 21, 1973 for respondent to file an answer to the amended complaint, which time to answer was subsequently extended until November 12, 1973.

At a further prehearing conference held on November 30, 1973, respondent's Answer To Amended Complaint filed on November 12, 1973, was discussed. In its Answer, respondent generally admitted the factual allegations of the complaint (see PHC Tr. 56-60), but denied those paragraphs which allege the respondent's conduct to be unlawful. At the said prehearing conference, the complaint was further amended on the record by the undersigned as follows (PHC Tr. 74):

> "I think the two major points were that the complaint is concerned with all Fedders room air conditioners, and is concerned with all advertisements which made the claim that reserve cooling power was unique, and in paragraphs 9 through 12, we are reading into the complaint, 'compared with all other room air conditioners.' Those are the amendments, and I think making them on the record here is sufficient."

Respondent, in response to the amendments made orally at the prehearing conference, filed an Answer To Further Amended Complaint on December 28, 1973. So that the public record would reflect these amendments to the complaint made at the prehearing conference, an Order Further Amending Complaint was issued by the undersigned on January 10, 1974. Respondent was given until January 21, 1974 to further amend its Answer, if necessary. No further answer was filed.

The First Stipulation Of The Parties was filed on March 19, 1974. This Stipulation provides that the term "reserve cooling power" shall refer to the description of that term which is stated in Paragraphs 5 and 8 through 11 of respondent's Answer To Further Amended Complaint, complaint counsel thereby in effect adopting respondent's definition of RCP in lieu of the definition of that term set forth in the complaint. The Second Stipulation Of The Parties, also filed on March 19, 1974, is an agreement that the information contained therein is a fair and accurate description of the extent of dissemination of Fedders room air-conditioner advertising in four sample areas over a two-year period.

A further prehearing conference scheduled for March 27, 1974 was cancelled and rescheduled for March 29, 1974 because of the illness of counsel for respondent. Due to the continued illness of counsel for respondent, the pre-hearing conference scheduled for March 29, 1974 was cancelled, and a formal hearing was scheduled by the undersigned for April 16, 1974.

At the formal hearing held on April 16, 1974, no witnesses were called; respondent's exhibits 1 A-Z-55, 2 A-B, and Joint Exhibit 1 A-I were received in evidence; complaint counsel's Motion To Strike Affirmative Defenses and Motion For Summary Decision were denied on the record; the record was closed for the reception of evidence; and, upon request of counsel for respondent, the

filing of simultaneous proposed findings was postponed from May 16, 1974 to May 30, 1974, and the filing of replies thereto postponed from May 30, 1974 to June 10, 1974 (Tr. 99-101). Respondent's time in which to submit a reply was subsequently extended to June 12, 1974.

A Stipulation Of The Parties, dated April 10, 1974, referring to the term "reserve cooling power", was filed on April 13, 1974. On April 24, 1974, an Order Incorporating Into The Record Stipulation Of The Parties, dated April 19, 1974, was issued by the undersigned. By this Stipulation, the parties accepted respondent's definition of "reserve cooling power" for all purposes of this proceeding.

The parties have submitted proposed findings, supporting memoranda, and proposed orders. Respondent has also filed a reply brief. This proceeding is therefore before the undersigned based upon the complaint, as amended, the answers filed by respondent, the stipulations of the parties, the joint exhibit of the parties, the proposed findings and memoranda submitted by the parties, and respondent's reply brief. No witnesses were called to testify, and the exhibits of record are by stipulation. Thus, the basic facts herein are undisputed.

The submissions by the parties have been given careful consideration and, to the extent not adopted by this decision in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and include references to the principal supporting evidence in the record. Such references are intended to serve as convenient guides, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

Initial Decision, Dated July 15, 1974

References to the record are set forth in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CPF —Proposed Findings of Fact, Conclusions of Fact And Law, And Order submitted by Complaint Counsel.

CM —Memorandum In Support Of The Proposed Findings of Fact, Conclusions of Fact And Law, And Order submitted by Complaint Counsel.

RAFAC —Respondent's Answer To Further Amended Complaint.

RPF —Respondent's Proposed Findings of Fact And Conclusions of Law.

RB —Respondent's Brief To The Administrative Law Judge.

RO —Proposed Order submitted by Respondent.

RX —Respondent's Exhibits.

Jt. Stip. —Joint stipulation submitted by the parties. (The abbreviation will be followed by the number of the stipulation and the page number upon which the evidence being cited appears.)

Jt. Ex. —Joint Exhibit of the parties.

PHC Tr. —Transcript of the prehearing conferences, followed by the page number being referenced.

Tr. —Transcript of the formal hearing, followed by the page number being referenced.

Initial Decision, Dated July 15, 1974

Findings of Fact

Identity And Business of Respondent

1. Respondent Fedders Corporation, hereinafter sometimes referred to as "Fedders", is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at Edison, New Jersey (Admitted, RAFAC, Par. 1).

2. Respondent Fedders is now and has been engaged in the advertising, offering for sale, sale and distribution of Fedders air conditioners, including Fedders room air conditioners (Admitted, RAFAC, Par. 1).

3. In the course and conduct of its aforesaid business, respondent Fedders now causes and has caused its air conditioners, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various states of the United States, and in the District of Columbia. Respondent Fedders therefore maintains, and at all times mentioned herein has maintained, a substantial course of trade in said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act (Admitted, RAFAC, Par. 1).

4. In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Fedders has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent (Admitted, RAFAC, Par. 1).

5. In the course and conduct of its business as aforesaid, and for the purpose of inducing the sale of its

said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has disseminated, and caused to be disseminated, certain advertisements of its room air conditioners, including but not limited to, advertisements printed in newspapers located in various states of the United States and in the District of Columbia, which newspapers are disseminated across state lines (Admitted, RAFAC, Par. 1).

The Challenged Advertisements

6. Pursuant to a resolution of the Federal Trade Commission dated June 9, 1971, and amended July 7, 1971, entitled "Resolution Requiring Submission of Special Reports Relating to Advertising Claims and Disclosure Thereof by the Commission in Connection with a Public Investigation", 36 Fed. Reg. 12,058 (June 9, 1971), as amended, 36 Fed. Reg. 14,680 (July 7, 1971) (Motion of Complaint Counsel For Summary Decision, Appendix A, p. 1, Appendix B, p. 1), on September 30, 1971, the Commission ordered respondent Fedders to file a Special Report on specific advertising claims. One of the advertising claims for which the Commission requested documentation and other substantiation by Special Report was:

> "RESERVE Cooling Power—only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days."

The information demanded was:

> "All documentation and other substantiation for the claim that only the Fedders room air conditioner has extra cooling power that assures cooling on extra hot, extra humid days." (Motion of Complaint Counsel For Summary Decision, Appendix A, p. 4.)

The specific advertisement questioned by the Commission's Special Report appeared in *The Monroe Morning World*, Monroe, Louisiana, June 10, 1971 (Motion of Complaint Counsel For Summary Decision, Appendix A, p. 3).

7. Respondent filed its response to the Commission's Special Report on December 22, 1971. In its response, Fedders admitted the lack of substantiation for the claim that RCP was unique to Fedders. Respondent stated:

> "As to claim that *only* Fedders has this reserve cooling power feature, we have found that this claim is not substantiated and do not propose to include it in any further advertising copy which we may promulgate." (Motion of Complaint Counsel For Summary Decision, Appendix B, p. 3.)

8. The advertisement set forth in the Commission's Special Report was incorporated in Paragraph Six of the complaint herein and was alleged in Paragraphs Seven and Eight of the complaint to be a uniqueness claim for Fedders room air conditioners, which is false and deceptive. Respondent has admitted that this advertisement represented, directly or by implication, that RCP is a unique feature of Fedders room air conditioners. Respondent further admitted that RCP, referring to ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners and that comparable room air conditioners made by some other companies have such ability and feature (RAFAC, pp. 1-2).

The complaint in Paragraph Eight alleges that RCP refers to "an increased cooling capacity at high loading conditions". The parties have stipulated that RCP refers to the "ability to function satisfactorily under conditions of extreme heat and humidity" (First Stipulation Of The Parties; RAFAC, p. 2; Stipulation Of The

Parties dated April 19, 1974). These meanings are essentially equivalent and any distinction between the two definitions is without significance in this proceeding.

9. By and through the use of the aforesaid statements and representations, respondent has represented, directly or by implication, that RCP is a unique feature of Fedders room air conditioners, not found in other room air conditioners (Admitted, RAFAC, p. 1). In truth and in fact, RCP, referring to an ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners. In fact, comparable room air conditioners made by some other companies function satisfactorily under conditions of extreme heat and humidity (Admitted, RAFAC, p. 2). Therefore the statements and representations that RCP is a unique feature of Fedders room air conditioners is false, misleading, and deceptive.

10. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that, at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity (Admitted, RAFAC, Par. 5). In truth and in fact, at the time the aforesaid statements and representations were made, respondent had no reasonable basis to support the representation that Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity (Admitted, RAFAC, Par. 5). Therefore, the statements and representations were and are false, misleading and deceptive.

11. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use. At the time said statements and representations were made, respondent had no reasonable basis from which to conclude that such was the fact (Admitted, RAFAC, Par. 5). Therefore, the statements and representations were and are false, misleading and deceptive.

12. The use by respondent of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

Respondent's Defenses

13. In its answers, filed herein, including its Answer To Further Amended Complaint, respondent, as and for an affirmative defense, alleges that it, in good faith, many months prior to the issuance of notice by the Commission of a proposed adjudicative proceeding against respondent in respect to the facts alleged in the complaint, ceased disseminating all advertising material relating to RCP and has not since resumed the dissemination of any such material. Respondent further alleged, as and for mitigating circumstances if the allegations in the complaint are sustained, that the advertising claim alleged in the complaint to be false, misleading or deceptive is only one of approximately ten advertising claims made by respondent as to which it was required by the Com-

mission to furnish supporting material. Respondent furnished such material in respect to the other advertising claims in response to the Commission's Order, and none of the other claims have been challenged by the Commission (RAFAC, pp. 3-4). Respondent further affirmatively averred in its Answer To Further Amended Complaint that the challenged statements and representations of uniqueness of RCP were so infrequently made and constituted so small a percentage of respondent's advertising expenditures that its impact upon the purchasing public was insignificant (RAFAC, pp. 1-2).

Respondent's Expenditures For RCP Advertisements

14. In view of respondent's contentions concerning the insubstantiality of advertisements claiming uniqueness for RCP, the Administrative Law Judge suggested there should be submitted for the record the total advertising expenditures, the total number of advertisements which utilized the term "reserve cooling power", the expenditures for those advertisements, the total number of advertisements which utilized a claim of uniqueness for "reserve cooling power", the total expenditures for those advertisements, as well as sample advertisements of both types. It was further suggested by the Administrative Law Judge that such information could be based on a sample area (PHC, Tr. 70).

15. The sample areas agreed upon by the parties for the above purposes are as follows:

(1) *The Florida Area:*

This area, serviced during the years involved by Cain & Bultman, as distributor, comprised the entire State

of Florida (except the extreme northwest portion thereof), and the eleven southeasternmost counties of the State of Georgia.

(2) *The Washington, D. C. Metropolitan Area:*

This area, serviced during the years involved by American Appliance Wholesalers, as distributor, consisted of the District of Columbia, together with thirteen Virginia counties and five Maryland counties in the surrounding area.

(3) *The Philadelphia Metropolitan Area:*

This area, serviced during the years involved by Samuel Jacobs Distributors, Inc. and its subsidiaries and affiliates, as distributors, consisted of the City of Philadelphia and nearby counties, of which twenty-one were in the State of Pennsylvania, eight in the State of New Jersey, and two in the State of Delaware.

(4) *The New York Metropolitan Area:*

This area, serviced during the years involved by L & P Electric Co., Inc. and its subsidiaries and affiliates, as distributors, consisted of New York City, Long Island, the eight southernmost counties of New York adjacent to New York City, thirteen counties in eastern and northern New Jersey, six counties in western and central Connecticut, and three counties in the southernmost part of Massachusetts (Respondent's Response To Commission's Motion For Summary Decision, Exhibit 1 of the Pochick Affidavit; Tr. 88-90).

16. The time period agreed upon for the sample areas was the two fiscal years of respondent ending August 31, 1970 and August 31, 1971, respectively (Second Stipulation Of The Parties, p. 1; RPF, p. 9).

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17. The parties stipulated that Fedders' total advertising expenditures for each fiscal year in each sample area for Fedders air conditioners of all types were approximately as follows (Second Stipulation Of The Parties):

	Fiscal 1969-1970	Fiscal 1970-1971
Florida	$176,000	$245,000
Washington, D. C.	$ 35,000	$ 24,000
Philadelphia	$180,000	$118,000
New York	$860,000	$846,000

Of the above total, the following represents total advertising expenditures for each year in each sample area for cooperative newspapers advertising of Fedders room air conditioners (Second Stipulation Of The Parties; Tr. 90):

	Fiscal 1969-1970	Fiscal 1970-1971
Florida	$ 90,036.04	$ 77,857.76
Washington, D. C.	$ 28,760.87	$ 6,717.95
Philadelphia	$ 99,810.15	$ 44,388.59
New York	$247,403.62	$142,313.53

The parties have stipulated that the total number of insertions of cooperative newspaper advertisements in each sample area were as follows (Second Stipulation Of The Parties):

	Fiscal 1969-1970	Fiscal 1970-1971
Florida	1229	920
Washington, D. C.	163	85
Philadelphia	985	309
New York	1997	1202

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Further, the parties stipulated that the following represents the total number of cooperative newspaper advertisements claiming RCP and the total expenditures for such advertisements (Second Stipulation Of The Parties; Stipulation Of The Parties dated April 19, 1974):

	Fiscal 1969-1970		Fiscal 1970-1971	
	Insertions	Expenditures	Insertions	Expenditures
Florida	252	$ 29,002.72	111	$15,067.38
Washington, D. C.	73	$ 10,987.70	25	$ 2,236.24
Philadelphia	291	$ 29,940.69	132	$17,409.14
New York	1487	$129,131.33	738	$48,266.75

The parties have stipulated that, of the above number of cooperative newspaper advertisements, the following number claimed uniqueness to Fedders of RCP followed by the expenditure for such advertisements:

	Fiscal 1969-1970		Fiscal 1970-1971	
	Insertions	Expenditures	Insertions	Expenditures
Florida	37	$2,899.38	35	$5,946.05
Washington, D. C.	9	$ 826.91	8	$ 371.93
Philadelphia	33	$4,876.74	9	$ 896.74
New York	33	$1,750.06	9	$ 701.90

18. On the basis of the above stipulated figures, respondent's expenditures for cooperative advertisements claiming uniqueness for RCP constitute the following

ratio to total advertising expenditures and to total cooperative advertising expenditures:

	Total 2-yr. Expenditures	Total 2-yr. Expenditures for Advertisements Claiming Uniqueness for Reserve Cooling Power	Ratio Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power to Total Advertising Expenditures
Florida	$ 421,000	$ 8,845.43	2.1 %
Washington, D. C.	59,000	1,198.84	2.03 %
Philadelphia	298,000	5,773.48	1.94 %
New York	1,706,000	2,451.96	.143%
	$2,484,000	$18,269.71	.736%

	Total 2-yr. Cooperative Advertising Expenditures	Total 2 yr. Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power	Ratio Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power to Total Cooperative Advertising Expenditures
Florida	$167,893.80	$ 8,845.43	5.27%
Washington, D. C.	35,478.82	1,198.84	3.38%
Philadelphia	144,198.74	5,773.48	4.04%
New York	389,717.15	2,451.96	.63%
	$737,288.51	$18,269.71	2.47%

19. On the basis of the above stipulated figures, respondent's advertisements claiming uniqueness for reserve cooling power and advertisements not claiming uniqueness for reserve cooling power, and the expenditures therefor, constitute the following ratio to the total number of cooperative advertisements utilized by respondent and the following ratio for the expenditures for such advertisements:

	Total Number Cooperative Advertisements 1969-1971	Total Number Cooperative Advertisements 1969-1971 Claiming Reserve Cooling Power	Total Number Cooperative Advertisements Claiming Uniqueness For Reserve Cooling Power
Florida	2149	363	72
Washington, D. C.	248	98	17
Philadelphia	1294	423	49
New York	3199	2225	42
Totals	6890	3109	173

Ratio Advertisements Claiming Uniqueness for Reserve Cooling Power To All Reserve Cooling Power Advertisements 1969-1971

All Areas 5.56%

Total Expenditures For Advertisements Claiming Reserve Cooling Power 1969-1971	Total Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power 1969-1971

Florida	$ 44,070.10	$ 8,845.43
Washington, D. C.	13,223.94	1,198.84
Philadelphia	47,349.83	5,773.48
New York	177,398.08	2,451.96
	$282,041.95	$18,269.71

	Ratio Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power To All Reserve Cooling Power Advertisements 1969-1971
All Areas	7.8%

20. In the Florida subarea, the majority of the advertisements with unique RCP claims were in newspapers with circulations of less than 50,000. However, there were several advertisements placed in newspapers with daily circulation figures in excess of 170,000. In the Washington, D. C. subarea, most of such insertions were in small publications, none with a circulation of over 30,000 and most under 12,000. In the Philadelphia subarea, roughly one-half of the insertions were in small town or small city publications, with circulations of under 100,000. Several advertisements appeared in the *Philadelphia Inquirer* with a daily circulation of over 450,000. In the New York City subarea, all of the insertions were in small town or small city newspapers, the largest with a circulation of 66,000. Examination of the texts of these advertisements discloses that the unique RCP claim was featured in only a minority of the advertisements (RX 1).

21. The parties hereto have further stipulated that respondent's expenditures for advertising which claimed "reserve cooling power" were, with insignificant exceptions (the cost of certain store display cards and the imprints on certain factory cartons), confined to the aforesaid cooperative advertisements (Stipulation Of The Parties dated April 19, 1974).

Respondent's Advertisements Not Claiming Uniqueness For Reserve Cooling Power

22. Complaint counsel contend that Fedders' advertisements, referring to RCP without claiming uniqueness, suggested the superiority of the feature with language similar to that used in the uniqueness claims.. Samples of advertisements selected by complaint counsel and respondent as representative of such advertisements are contained in the record (Second Stipulation Of The Parties, Attachment A). These advertisements, while not claiming uniqueness for "reserve cooling power", state the following with respect to "reserve cooling power":

> "RESERVE COOLING POWER . . . it's Fedders engineering 'extra' which gives maximum cooling even when sunload reaches 115° . . . and other units fail!"
>
> "Fedders Sound Barrier models—as close to perfect as an air conditioner can get . . . plus Reserve Cooling Power for an extra cooling strength."
>
> "You get Reserve Cooling Power for extra hot, extra humid days."
>
> "PLUS RESERVE COOLING POWER, Too (for extra hot, humid days)."
>
> "And you get: Reserve Cooling Power for extra hot, humid days; . . ."

23. Complaint counsel introduced no evidence to establish consumer perception of the representations contained in respondent's advertisements, or that there were latent

or implied messages in the statements. The Administrative Law Judge must therefore exercise his own judgment as to the representations, express or implied, contained in respondent's advertisements.

24. These advertisements, which state that "reserve cooling power" is an "extra" or is a feature designed for extra hot, humid days, or gives extra cooling strength, do not claim such feature is *unique* with Fedders room air conditioners. The only advertisement which contains a comparative claim is the first representation set forth above, which states that "reserve cooling power" is a Fedders engineering "extra" which gives maximum cooling even when sunload reaches 115°, and other units fail. This is a comparative representation, but it does not compare Fedders room air conditioners with *all* other room air conditioners.

25. The complaint challenges as unlawful Fedders' statements and representations that "reserve cooling power" is "a unique feature of Fedders room air conditioners" when such was not a fact (Paragraphs Seven and Eight); that, by and through the uniqueness claim, Fedders represented, directly or by implication, that Fedders had a reasonable basis from which to conclude the Fedders room air conditioners had a significantly increased ability to function satisfactorily under conditions of extreme heat and humidity when compared with all other room air conditioners, when in fact Fedders had no reasonable basis for making such claim (Paragraphs Nine and Ten); and that, by and through the use of the uniqueness claim, Fedders also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly increased ability to function satisfactorily under conditions of extreme heat and humidity when Fedders had no reasonable basis to conclude that such was the fact (Paragraph Eleven). Thus, the unlawful representations made by Fedders, which are challenged in the complaint, arise from the "uniqueness" claim for Fedders air conditioners, as set forth in Paragraph Six of the complaint.

26. A "uniqueness" claim necesssarily connotes a comparison with all other air conditioners, unless the literal wording of the complaint warrants some other interpretation (see *ITT Continental Baking Company, Inc., et al.*, Docket No. 8860, Opinion Of The Commission, dated October 19, 1973, Slip Op., pp. 14-15). In fact, the Administrative Law Judge amended the complaint allegations in this matter to specifically state that the uniqueness representations of superiority were to be measured against all other room air conditioners (PHC Tr. 48-49; Order Further Amending Complaint, January 10, 1974). The Administrative Law Judge therefore concludes that the representative advertisements of Fedders room air conditioners, which utilize "reserve cooling power", but which do not claim uniqueness for this feature, are not challenged in the complaint.

27. The stipulated advertising figures in the record establish that 45.1% of respondent's cooperative advertisements utilize RCP representations, and 2.51% of respondent's cooperative advertisements claim uniqueness for RCP. Of all advertisements claiming RCP, 5.56% thereof claim uniqueness. As far as expenditures are concerned, 2.47% of total cooperative advertising expenditures were for advertisements claiming RCP. Of expenditures for advertisements claiming RCP, 7.8% thereof was expended for advertisements claiming uniqueness for RCP. In view of the small percentage of advertisements claiming uniqueness for RCP and the small percentage of expenditures for advertisements claiming uniqueness for RCP in relation to respondent's total advertising program involving RCP claims, the Administrative Law Judge concludes, in the absence of any evidence pre-

sented by either party bearing on this issue, that there was no carry-over effect on consumers, from advertisements claiming uniqueness for RCP to advertisements merely claiming RCP. The record is silent as to the type of in-store display cards utilized, or the extent of their use (see Finding 21).

Respondent's Discontinuance Defense

28. When Fedders responded to the Commission's Special Report on December 22, 1971, it stated as follows:

> "As to the claim that *only* Fedders has this reserve cooling power feature, we have found that this claim is not substantiated and do not propose to include it in any further advertising copy which we may promulgate" (Motion of Complaint Counsel For Summary Decision, Appendix B, p. 3; Jt. Ex. 1).

Also, on December 22, 1971, Fedders sent a bulletin to all of its distributors advising that "Old powerful selling friends like 'Reserve Cooling Power', 'multi-room cooling', 'cools three rooms, even a small home', 'installs in minutes', 'germicidal filter' are no longer." Distributors were further advised that they are not to use any of the advertisements provided in 1971 and earlier years. Distributors are requested to advise dealers that advertisements must not make any claims for the Fedders product that are not made in Fedders' supplied 1972 materials (Jt. Ex. 1 H).

This bulletin does not acknowledge that "reserve cooling power" claims were untrue, or were capable of misleading customers, or could not be proved or substantiated. Instead, the bulletin states that Fedders is "eliminating every phrase that could possibly be questioned by the FTC" (Jt. Ex. 1 H). The bulletin also indicates that "reserve cooling power", along with the other advertising representations, are being eliminated "not that they are not provable or that they are misleading, but simply because the explanation and qualifications that would have to be included in each ad would take up too much space" (Jt. Ex. 1 H).

29. An affidavit by Harold Boxer, Director of Merchandising of Fedders, which is attached to Respondent's Response To Commission's Motion For Summary Decision, stated that the Fedders Advertising Department in or about 1964 or 1965 coined the phrase "reserve cooling power" as an expression of the operating characteristics under extreme temperatures of Fedders room air conditioners, and the words had been featured in Fedders' advertising through 1971.

30. In an affidavit attached to Respondent's Response To Commission's Motion For Summary Decision, Paul C. Anderson, Advertising Manager for Room air Conditioners of Fedders, stated that all references to "reserve cooling power" were completely dropped from Fedders' advertising in December 1971 and that those words have not been used by Fedders in the preparation of further advertising matter.

31. Sam Muscarnera, House Counsel for Fedders, has submitted an affidavit dated April 15, 1974, which has been received into the record by stipulation of counsel for the parties (Jt. Ex. 1 C-G). Mr. Muscarnera has set forth the steps taken by Fedders in order to maintain firmer control, insofar as possible, over advertising. Mr. Muscarnera also stated that "the likelihood of Fedders' repetition of the offending practices charged is exceedingly remote" (Jt. Ex. 1 G).

32. The Commission served its Order To File Special Report calling for advertising substantiation on respondent on October 15, 1971; notice of a proposed adjudicative

hearing was served on respondent on October 12, 1972; and the formal complaint herein issued on June 11, 1973 (RPF, p. 7).

33. There is no evidence in the record indicating that any claims for "reserve cooling power" have been disseminated since December 22, 1971 (Jt. Ex. A-E).

34. "Climatrol" brand room air conditioners are manufactured by Fedders, and marketed through a wholly-owned subsidiary known as Mueller Climatrol Corp. An advertisement for "Climatrol" central air conditioners appeared in the March 4, 1974 issue of *Newsweek* magazine which claimed, among other things, that the rotary compressor of the unit was "exclusive". This advertisement was called to Fedders' attention by complaint counsel, who questioned the use of the word "exclusive" by Climatrol in light of the fact that similar products are manufactured and marketed by Fedders under the "Fedders" brand. Fedders has maintained, in an affidavit submitted by Mr. Muscarnera, that Mueller Climatrol Corp., in contrast to the great majority of Fedders' subsidiaries and divisions, is semiautonomous, and its sales and advertising staff operate independently of the advertising organization and personnel of Fedders. Consequently, up to the time the above advertisement appeared, Mueller Climatrol Corp. had not cleared its advertising through Fedders, as had other Fedders divisions. Mueller Climatrol had previously been advised by Fedders to avoid the use of the word "exclusive" in any context whenever possible, and, accordingly, as early as October 15, 1973, had substituted the word "exciting" for the word "exclusive" as applied to the rotary compressor (Jt. Ex. 1 F).

35. While the exclusivity of the rotary compressor in the residential central air conditioning field is not challenged in this proceeding, the use of the word "exclusive" as to "Climatrol" brand units could, from a technical

standpoint, create confusion in consumers' minds unless accompanied by appropriate explanatory material (Jt. Ex. 1 F). This incident is of significance to this proceeding in view of respondent's discontinuance argument, since it clearly indicates that Fedders had not taken appropriate steps, at least as of October 1973, to prevent the promulgation of false or deceptive advertisements by all its subsidiaries and divisions because Climatrol advertisements were not cleared through Fedders as of that date. In fact, it appears that as late as March 1974, Fedders' divisions and subsidiaries were utilizing advertisements containing representations which had not been reviewed and cleared by responsible Fedders officials.

Conclusions.

The complaint, as amended by the Administrative Law Judge, charges that respondent represented that reserve cooling power is a unique feature of Fedders room air conditioners, not found in other room air conditioners, and that, in fact, respondent had no such reasonable basis as to Fedders room air conditioners. The complaint, as amended, also charges respondent with representing that it had a reasonable basis for the claim that reserve cooling power is unique with Fedders room air conditioners and that, in fact, respondent had no such reasonable basis for such representation. The amended complaint further charges that by use of the uniqueness claim, respondent represented that its room air conditioners operated in a way superior to the functioning of other room air conditioners, and that such is not a fact.

In its Answer To Amended Complaint, respondent admitted making these representations, that it had no reasonable basis therefor, and that there was no basis in fact for the representations. Therefore, all allegations of unlawful conduct charged in the complaint have been admitted. Under the doctrine pronounced by the Com-

mission in *Pfizer,* "• • • it is an unfair practice in violation of the Federal Trade Commission Act to make an affirmative product claim without a reasonable basis for making that claim." *Pfizer, Inc.,* Docket 8819, Opinion of the Commission, 81 F. T. C. 23, 62 (1972).

Thus, the only issues remaining after the pleadings are whether these admittedly unlawful acts and practices have the tendency and capacity to mislead a substantial portion of the purchasing public; whether discontinuance is a defense to an order in this proceeding; and whether respondent's conduct was sufficiently serious to support an order.•

Discontinuance

It is undisputed that claims relating to reserve cooling power have been discontinued. The circumstances surrounding discontinuance, set forth hereinafter, are likewise undisputed.

The advertising campaign for reserve cooling power was of lengthy duration, beginning at least in the mid-sixties and continuing until late 1971, the date of the discontinuance. The extended usage of the claims is a strong indication of the importance of said claims to the advertising strategy followed by respondent. Respondent has referred to the reserve cooling power advertising claims as an "[O]ld powerful selling friend(s)" (Jt. Ex. 1 H).

•In its reply brief respondent states: "The central issues are two: first, whether under all the circumstances here involved, the complaint should be dismissed by reason of Respondent's discontinuance of the offending practice, and second, if the complaint is not dismissed, whether Complaint Counsel's Proposed Order • • • is impermissibly broad" (Reply Brief, pp. 1-2).

The discontinuance of reserve cooling power claims in late 1971 cannot be considered to have been a voluntary action. The record establishes that the discontinuance occurred as a direct result of respondent's awareness of the Commission's investigation of its advertising. The record clearly demonstrates that it was only during the preparation of the response to the Commission's Special Report that respondent made the decision to discontinue the uniqueness claim, as well as the more general claim regarding reserve cooling power. It was not until the same date that respondent filed its response to the Special Report with the Commission that it warned its distributors to stop making any reserve cooling power claims. "In other words respondent stopped violating the law when it learned that the law's hand was already on its shoulder, • • •." *Coro, Inc., et al.,* Docket 8346, Opinion of the Commission, 63 F. T. C. 1164, 1201 (1963). "'That discontinuance of an unlawful practice, of itself, does not necessarily preclude the issuance of a cease and desist order is so well settled as to preclude further argument.'" *Giant Food, Inc.,* Docket 7773, Opinion of the Commission, 61 F. T. C. 326, 356 (1962), citing *Marlene's Inc. v. F. T. C.,* 216 F. 2d 556, 559 (7th Cir. 1954). Further, the courts have consistently recognized the propriety of a cease and desist order when, as in this case, the discontinuance was not entirely voluntary. *Galter v. F. T. C.,* 186 F. 2d 810, 812, 813 (7th Cir. 1951), cert. den. 342 U. S. 818 (1951); *Eugene Dietzgen Co. v. F. T. C.,* 142 F. 2d 321, 330 (7th Cir. 1944), *cert. den.* 323 U. S. 730 (1944). Thus, the fact that respondent's discontinuance is directly attributable to the Commission's investigation must be given substantial weight when judging the merits of respondent's discontinuance.

The First Circuit in *Coro, Inc., v. F. T. C.,* 338 F. 2d 149, 153 (1964), *cert. den.* 380 U. S. 954 (1965), in upholding a Commission cease and desist order based on a

showing of unfair and deceptive practices used in only one percent of the business solicited by a respondent which had no prior record of violations of the Federal Trade Commission Act, found the following circumstances which it said negated the respondent's defense of discontinuance:

> "But Coro gave the line of business up only after the Commission had started to investigate its practices therein and only a few months before the Commission filed its complaint, and we have only the current corporate officers' expression of intention not to resume the business. Coro has not disposed of its plant. It is still in the costume jewelry business and there is nothing to suggest that it does not intend to continue in that general industry."

The facts in the present case closely resemble the circumstances found by the Court in *Coro*. Respondent continues to sell air conditioners, continues to advertise air conditioners, and could resume making deceptive advertising claims at any time in the future. The only special circumstance demonstrated by respondent is affidavits submitted by corporate officials.

The steps taken by respondent's officials to insure that future advertising violations will be avoided appear less than satisfactory. The record shows that one of the respondent's subsidiaries has as recently as March, 1974, long after the complaint herein had issued, widely disseminated a questionable uniqueness claim for an important performance characteristic of an air conditioner. In a joint exhibit, Mr. Muscarnera, respondent's in-house counsel, stated in an affidavit that a recent advertisement in a national news weekly magazine for a central air conditioner manufactured by Fedders, but sold under the Climatrol label, made a claim of exclusivity for Climatrol's rotary compressor, when central air conditioners

sold under the Fedders label also have the exact same feature. Most importantly, Mr. Muscarnera admitted that he was unaware of the dissemination of this particular advertisement until it was recently brought to his attention by complaint counsel.

The philosophy on which the Commission's Ad Substantiation Program is based, is that corporations must strive to exercise a higher level of responsibility than previously, by *assuring* themselves that *before* they disseminate an advertising claim, sufficient substantiation exists to constitute a reasonable basis as to the validity of such claim. *Pfizer, Inc., supra.* The Administrative Law Judge is definitely in accord with the holding in *Pfizer.* Clearly, respondent's admission of dissemination of a performance claim for its room air conditioners over a period of several years without having a reasonable basis therefor demonstrates a deficiency in the maintenance of the required standard of corporate responsibility in the past. Moreover, despite respondent's assurances of future discontinuance of this type of objectionable conduct, and recitation of precautions taken to prevent such future recurrences, the March, 1974 Climatrol advertisement suggests that respondent's officers have failed to exercise adequate precautions to prevent respondent's unsubstantiated advertising claims.

Therefore, the Administrative Law Judge is of the opinion that a cease and desist order is both necessary and proper in this proceeding. Without an order, the public has no definite assurance that the unlawful practices will not be resumed at some time in the future. *Fairyfoot Products Co. v. F. T. C.,* 80 F. 2d 684, 686-687 (7th Cir. 1935).

Respondent's Defense Based on Insubstantiality

Respondent argues that the impact of the offending advertising claims upon the purchasing public could not

have been substantial, in light of the limited circulation of the media in which the advertisements containing such claims were placed, the relatively few insertions involved, the small expenditures involved and their insignificance in relation to respondent's total advertising effort, and the fact that in most instances such claims were not featured in the advertisements in which they appeared, but were included merely as one of a considerable number of other claims (RB, p. 8).

In the present case, respondent considered the claims for reserve cooling power as a significant selling device—an old powerful selling friend (Jt. Ex. 1 H). The representation was utilized for several years, and was discontinued only when questioned by the Commission. The advertisement represented that *only* Fedders gives assurance of cooling on extra hot, extra humid days. Such a representation is the *raison d'etre* for an air conditioning unit—it is an extremely material representation. Thus, there can be no question that the challenged claims for this major feature were material.

Even when a claim is material, the Commission has at times chosen not to issue an order when it has found the violation to be so minor as to be *de minimis*. The doctrine is usually applied, however, where it appears the violation was an isolated, unintentional act, unlike the offender's usual practices. The Commission has been reluctant to invoke the *de minimis* doctrine, particularly in the case of advertising violations, and has in the past held one or a few advertisements to be sufficiently serious to justify the issuance of an order in the public interest (see *F. T. C. v. Colgate-Palmolive Co., et al.*, 380 U. S. 374, 395 (1965) (3 advertisements); *Gimbel Bros., Inc., v. F. T. C.*, 116 F. 2d 578, 579 (2d Cir. 1941) (advertisements published twice); *Gimbel Bros.*, 60 F. T. C. 359 (1962) (one advertisement), *appeal dismissed* 7 S. & D. 549 (3d Cir. 1962); and *Baldwin Bracelet Corp., et al.*,

61 M. T. C. 1345, 1363 (1962), *aff'd* 325 F. 2d 1012 (D. C. Cir. 1963), *cert. den.* 377 U. S. 923 (1964).

As the following figures show, this case deals not with an isolated incident, but with many different advertisements, each containing a deceptive representation, inserted in many newspapers, presumably on a national scale. Considering only the sample areas over the designated period of two years, there were the following numbers of insertions of advertisements claiming uniqueness of reserve cooling power: 72 insertions in Florida, 17 in Washington, D. C., 42 in Philadelphia, and 42 in New York, for a total of 173 insertions.

Respondent emphasizes that only ¾ of 1% of its total advertising expenditures in the sample areas was spent on reserve cooling power uniqueness claims, and of that total the expenditures for cooperative advertising bearing uniqueness claims in relation to total cooperative advertising expenditures had a ratio of only 2½%; and that only $18,269.00 was spent on cooperative advertising utilizing uniqueness claims during the two-year period in the sample areas (RPF, pp. 8-16). Respondent would thus conclude that the offending claims did not have the tendency and capacity to mislead a substantial portion of the purchasing public (RPF, p. 16).

The record does not show what proportion of national sales or advertising the sample areas constitute. Therefore, an accurate projection of the total number of insertions of offending advertisements is impossible. The record does show that reserve cooling power claims were run over a period of several years, although the record does not show what form the advertisements took or whether uniqueness claims were utilized. However, if the two-year period examined were typical of what occurred on a national scale, which the sampling device presupposes, we can safely speculate that the total numbers of deceptive uniqueness advertisements may have run well

into the thousands and expenditures therefor into the hundreds of thousands of dollars.

Respondent's argument merely establishes that the challenged advertising constituted a small portion of respondent's total advertising program; it does not establish that the false advertising claims were without impact on the public. Clearly, the violation, concerning a material claim broadly disseminated, involving hundreds, perhaps thousands of newspaper advertisements, cannot be regarded as *de minimis.* The Administrative Law Judge finds the language of the Commission in the *Baldwin Bracelet* matter particularly appropriate: "• • • we are not prepared to say that deception is all right if practiced in moderation." (61 F. T. C. 1363). Nor is deception permissible if practiced in small town newspapers of limited circulation (Reply Brief, p. 17). The Act also includes within its protection residents of small towns (see *Charles Of The Ritz Dist. Corp. v. F. T. C.,* 143 F. 2d 676, 679 [2d Cir. 1944]).

The Administrative Law Judge concludes, therefore, that respondent's dissemination of uniqueness representations for reserve cooling power, which were not in fact true and substantiated, constituted a substantial practice involving a material performance claim. Accordingly, these representations had the tendency and capacity to mislead a substantial portion of the purchasing public and are of such a magnitude as to warrant a cease and desist prohibition.

The Remedy

It is well settled that the Commission may, and should, enter an order of sufficient breadth to insure that a respondent will not engage in future violations of the law. To this end the Commission has wide discretion in fashioning an appropriate order. See *Jacob Siegel Co. v. F. T. C.,* 327 U. S. 608, 611-13 (1946); *F. T. C. v. Ruberoid*

Co., 343 U. S. 470, 473 (1952); *F. T. C. v. National Lead Co.,* 352 U. S. 419, 428-30 (1957); *F. T. C. v. Colgate-Palmolive Co.,* 380 U. S. 374, 392 (1965). Commission orders have been consistently upheld whenever the orders are reasonably related to the unlawful practices found to exist and are clear and precise so that they may be understood by those against whom they are directed. *Jacob Siegel, supra,* at 611-13; *Ruberoid, supra,* at 473; *F. T. C. v. Cement Institute,* 333 U. S. 683, 726 (1948).

The Commission, within this framework, may reasonably ban the precise practice found to violate the Federal Trade Commission Act, and may enjoin "like and related" practices. *F. T. C. v. Mandel Bros., Inc.,* 359 U. S. 385, 392-393 (1959); *Niresk Industries, Inc., v. F. T. C.,* 278 F. 2d 337, 343 (7th Cir. 1960), *cert. den.* 364 U. S. 883 (1960); *Consumers Products of America, Inc., et al. v. F. T. C.,* 400 F. 2d 930, 933 (3d Cir., 1968), *cert. den.* 393 U. S. 1088 (1969). Further, a respondent "caught violating the Act must expect some fencing in." *F. T. C. v. National Lead Co., supra,* at 510. While recognizing that it would be inappropriate to narrow the scope of the order to the precise misrepresentation made (uniqueness of a single characteristic, namely, "reserve cooling power"), respondent submits that it is entirely fitting and proper for the order to be confined to unfounded claims of uniqueness of any attribute or characteristic. Respondent contends that the notice order, embracing as it does all "performance characteristics" of any Fedders air conditioners, "is completely impermissible" (RB, pp. 14-15).

The form of order served with the complaint would prohibit uniqueness claims of any kind and misrepresentations of performance characteristics of any kind. The notice order also provides for record keeping. Complaint counsel have made minor changes in their proposed form of order from the form of order served with the complaint.

The order entered by the Administrative Law Judge herewith prohibits respondent from making any uniqueness claims. It would also prohibit the making of any representation as to a performance characteristic of any air conditioner unless, at the time of the making of the representation, respondent had a reasonable basis for such representation. The order entered herewith also requires that records of the documentation in support of performance claims be maintained for three (3) years after such claims are made and that such records be made available to the Commission upon reasonable notice. The record-keeping provision is limited to ten (10) years from the date the order becomes final. Thus, the Administrative Law Judge has basically adopted the proposed order served with the complaint and recommended by complaint counsel, with minor changes which are without substantial substance such as combining specific prohibitions into the broader prohibition.

Respondent has admitted disseminating a false performance claim for its room air conditioners relating to the uniqueness of the ability of its room air conditioners to function satisfactorily at conditions of extreme heat and humidity. Respondent seems to acknowledge (RB, p. 15) that the order may properly extend beyond the confines of this one misrepresentation. The Administrative Law Judge is of the opinion the order should prohibit respondent from making *any* performance claim for its air conditioners unless it possesses adequate substantiation for the claim at the time the representation is made. The Commission has recognized the propriety of orders governing all performance characteristics. *The Firestone Tire and Rubber Co.,* Docket 8818, 81 F. T. C. 398,. 475 (1972), *aff'd* 481 F. 2d 246, 250 (6th Cir. 1973), *cert. den.* 42 U.S.L.W. 3362 (December 18, 1973). This provision of the order simply states explicitly the requirements already recognized by *Pfizer:* the possession of a reasonable basis for any material claim at the time the claim

is disseminated. Because this provision simply sets forth a presently-existing obligation, it imposes little additional burden upon respondent, even extending it to all air conditioners.

The record-keeping provision requires respondent to keep, and make available to the Commission, those materials which constitute substantiation for any performance claims which may be made. These are the same materials which the Commission is presently empowered to demand in Section 6(b) Orders to File Special Reports. Consequently, the record-keeping provision, also an existing duty, reasonably incorporates all air conditioners. The only requirement included in this provision not previously spelled out by the Commission is that respondent retain such substantiation materials for three years, and this specific time requirement is not burdensome.

The requirement of record retention is the best possible method of preventing the recurrence of unsubstantiated claims. The requirement imposes little additional burden upon a respondent, which must, according to Pfizer, possess the materials at the time the claim is disseminated. At the same time, the retention will expedite Commission examination of the materials as soon as it suspects an unsubstantiated claim may have been or is about to be disseminated (after reasonable notice to respondent).

The Commission, as affirmed by the Sixth Circuit Court of Appeals, recognized the usefulness of a record-retention provision in the recent case, *Firestone Tire and Rubber Co., supra,* 481 F. 2d at 250. In that case, the identical three-year retention provision as proposed herein, was ordered and affirmed.

Accordingly, the order entered herewith is believed to be both appropriate and necessary to prevent future violations of the law.

Conclusions of Law

The Federal Trade Commission has jurisdiction over the respondent and this proceeding is in the public interest.

2. Respondent Fedders Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at Edison, New Jersey.

3. Respondent Fedders Corporation is now and has been engaged in the advertising, offering for sale, sale and distribution of Fedders room air conditioners. In the course and conduct of its aforesaid business, respondent Fedders Corporation now causes and has caused its air conditioners, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various states of the United States, and in the District of Columbia. Respondent Fedders Corporation therefore maintains, and at all times mentioned herein has maintained, a substantial course of trade in said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Fedders Corporation has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent.

5. In the course and conduct of its business as aforesaid, and for the purpose of inducing the sale of the said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has disseminated, and caused to be disseminated, certain advertisements of said room air conditioners, including

but not limited to, advertisements printed in newspapers located in various states of the United States and in the District of Columbia, which newspapers are disseminated across state lines. Typical of the statements and representations contained in said advertisements is the following segment of the print advertisement for Fedders room air conditioners:

> "RESERVE Cooling Power—only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days."

6. By and through the use of the aforesaid statements and representations, respondent has represented, directly or by implication, that reserve cooling power is a unique feature of Fedders room air conditioners, not found in other room air conditioners. In truth and in fact, "reserve cooling power", referring to the ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners. In fact, comparable room air conditioners made by other companies function satisfactorily under conditions of extreme heat and humidity. Therefore, such statements and representations were and are false, misleading and deceptive.

7. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that, at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that the Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity. In truth and in fact, at the time the aforesaid statements and representations were made, respondent had no reasonable basis from which to conclude that Fedders room air conditioners, compared with all

other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity. Therefore, the statements and representations were and are false, misleading and deceptive.

8. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity. At the time said statements and representations were made, respondent had no reasonable basis from which to conclude that such was the fact. Therefore, the statements and representations were and are false, misleading and deceptive.

9. The use by respondent of the aforesaid false, misleading and deceptive acts and practices have had, and now have, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

10. The aforesaid acts or practices of respondent, as herein found, were and are all to the prejudice and injury of the public and of respondent's competitiors, and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U. S. C. 45).

Order

IT IS ORDERED that respondent Fedders Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in commerçe as "commerce" is defined in the Federal Trade Commission Act, of air conditioners do forthwith cease and desist from:

1. Representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any material respect, unless such is the fact;

2. making, directly or indirectly, any statement or representation in any advertising or sales promotional material as to the performance characteristics of any air conditioner including, but not limited to, air cooling, heating, cleaning, circulation, dehumidification or humidification, efficiency and quietness of operation, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which may consist of competent scientific, engineering, or other similar objective material, or industry-wide standards based on such material.

3. failing to maintain accurate records which may be inspected by Commission staff members upon reasonable notice:

   (a) which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, inso-

far as the text of such claim is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any such division or subsidiary, which claim concerns the performance characteristics (including but not limited to air cooling, heating, cleaning, circulation, dehumidification or humidification, efficiency and quietness of operation) of, or the uniqueness of any feature of, any of respondent's air conditioners;

(b) which provided the basis upon which respondent relied as of the time the claim was made; and

(c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

The provisions of Paragraph 3 hereof shall be in effect for a period of ten (10) years from the date this order becomes final.

IT IS FURTHER ORDERED that respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation or placement of advertisements.

IT IS FURTHER ORDERED that respondent notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or

dissolution of any subsidiaries engaged in the manufacture and/or sale in commerce of air conditioning products or systems, or any other changes in the corporation which may materially affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after the effective date of the order, file with the Commission a report, in writing, setting forth in detail the manner and form of its compliance with this order.

July 15, 1974

s/ ERNEST G. BARNES,
Administrative Law Judge.

Final Order, Dated January 14, 1975.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

Commissioners:

Lewis A. Engman, Chairman.
Paul Rand Dixon.
Mayo J. Thompson.
M. Elizabeth Hanford.
Stephen Nye.

[SAME TITLE.]

This matter having been heard by the Commission upon the appeal of respondent's counsel from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion, having denied the appeal:

IT IS ORDERED that the initial decision of the administrative law judge, pages 1-30, is adopted as the Findings of Fact and Conclusions of Law of the Commission, except insofar as certain comments on pages 29-30 are inconsistent with the conclusions on pages 5-6 of the accompanying Opinion, and subject to the following changes:

P. 2, line 4, omit "that"
P. 3, line 9, word 4 "asserting"
P. 15, substitute 6.5% for 7.8%
P. 18, line 36, substitute 6.5% for 7.8%

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following order be entered:

Final Order, Dated January 14, 1975

Order

IT IS ORDERED that respondent Fedders Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of air conditioners, do forthwith cease and desist from:

1. Representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any material respect, unless such is the fact;

2. Making, directly or indirectly, any statement or representation in any advertising or sales promotional material as to the air cooling, dehumidification, or circulation characteristics, capacity or capabilities of any air conditioner, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which shall consist of competent scientific, engineering or other similar objective material or industry-wide standards based on such material;

3. Failing to maintain accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, insofar as the text of such claim is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising agency engaged for such purpose by re-

spondent or by any such division or subsidiary, which claim concerns the air cooling, dehumidification, or circulation characteristics, capacity, or capability of, or the uniqueness of any feature of, any of respondent's air conditioners;

(b) which provided the basis upon which respondent relied as of the time the claim was made; and

(c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

The provisions of paragraph 3 hereof shall be in effect for a period of ten (10) years from the date this order becomes final.

It is Further Ordered that respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation or placement of advertisements.

It is Further Ordered that respondent notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiaries engaged in the manufacture and/or sale in commerce of air conditioning products or systems, or any other changes in the corporation which may materially affect compliance obligations arising out of the order.

It is Further Ordered that respondent shall, within sixty (60) days after the effective date of the order, file with the Commission a report, in writing, setting forth in detail the manner and form of its compliance with this order.

By the Commission.

CHARLES A. TOBIN
Secretary

Seal

Issued: January 14, 1975

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

Commissioners:

Lewis A. Engman, Chairman
Paul Rand Dixon
Mayo J. Thompson
M. Elizabeth Hanford
Stephen Nye

IN THE MATTER

of

FEDDERS CORPORATION, a corporation.

Docket No. 8932

Opinion of the Commission.

By DIXON, Commissioner:

The complaint in this matter was issued on June 11, 1973, and charged respondent with dissemination of false and misleading advertisements in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45). In particular the complaint alleged that respondent had represented through advertisements in newspapers of interstate circulation that (1) "reserve cooling power"[1] is a unique feature of its room air con-

[1]Hereinafter sometimes "RCP," stipulated by the parties to mean "ability to function satisfactorily under conditions of extreme heat and humidity." (I. D. 8)

The following abbreviations are used herein:

I. D. —Initial Decision (Finding No.)
I. D. p. —Initial Decision (Page No.)
RB —Respondent's Appeal Brief (Page No.)

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ditioners, not found in other room air conditioners; (2) Fedders' room air conditioners compared with all other room air conditioners have a significantly increased cooling capacity at high loading conditions under customary conditions of use; and (3) Fedders had a reasonable basis for concluding that its product compared with all other room conditioners has said increased cooling capacity. Drawing on a brief record consisting of stipulations, joint exhibits, and a few respondent's exhibits[2], the administrative law judge sustained the complaint and recommended entry of an order. On appeal respondent has taken essentially the same position as it took before the administrative law judge, conceding the falsity of, and absence of reasonable basis for, the challenged representations but raising so-called affirmative defenses of "abandonment" and "insubstantiality," and arguing in the alternative that the order should be diminished in scope. We find the affirmative defenses to be patently without merit, as did the administrative law judge, but we believe that a slight modification of the order he has proposed is appropriate.

I. *Insubstantiality*

Respondent argues that it should be absolved from any liability in this matter because the number of offending advertisements constituted only a small percentage of respondent's total advertising expenditures. Evidence submitted by respondent indicated that in four sample areas, New York, Philadelphia, Washington, D. C., and Florida, during the sample two-year period ending August 31, 1971, the number of untruthful advertisements totaled 173

[2]In describing the record in this case, the administrative law judge neglected to make reference to certain exhibits submitted by respondent separately (I. D. p. 5, third full paragraph). There is no indication, however, that the administrative law judge did not actually consider these exhibits in fashioning his decision, and in any event the Commission has fully considered said exhibits in its own review of the record.

or 5.8% of all advertisements for reserve cooling power, and expenditures on such advertisements were $18,269 or 6.5% of all expenditures for advertisements touting RCP. (I. D. 17, 18) Respondent asserts in its appeal brief that the sample area accounted for "at least 35%" of its total United States' sales and advertising expenditures for the sample period.[3] Whatever the total number of offending advertisements may have been, it is clear to us that evidence from the sample area alone was quite sufficient to destroy whatever weight might be accorded respondent's defense of insubstantiality.

The Commission has previously issued orders in cases involving no more than one or a few deceptive advertisements. [See *Gimbel Bros.*, 60 FTC 359, 368 (1962), appeal dismissed per stipulations, No. 14019 (3d Cir. Oct. 8, 1962) unreported; *Gimbel Bros., Inc., v. FTC*, 116 F. 2d 578, 579 (2d Cir. 1941).] Here, in an area apparently accounting by respondent's estimate for far less than half of all its sales, 173 separate false advertisements were disseminated over a two-year period. This was 173 more than the law allows, and far more than warrant an appeal to the discretion of the Commission to omit an order in a litigated case. The fact that these advertisements constituted only a small percentage of respondent's total advertising program is wholly irrelevant. It merely demonstrates the truism that a larger advertiser inevitably

[3]RB 13. The administrative law judge, noting that advertisements for RCP had been run for several years prior to the sample period, concluded that the actual number of offending advertisements may have totaled in excess of 1,000. (I. D. p. 27) Respondent challenged this extrapolation, though it did agree to use a sampling procedure. The parties apparently disagree as to whether the sample may be taken as representative of Fedders' advertising during the entire period in which RCP advertisements were run, or simply as representative of Fedders' advertising throughout the country for the sample two-year period. Resolution of this disagreement is not necessary for our decision.

has more opportunities than a smaller one to engage in deceptive practices. Similarly, we are entirely unimpressed with the fact that the offending advertisements appeared in non-urban newspapers with less circulation than metropolitan dailies. We are pleased to note, however, that respondent does not maintain that "deception is all right if practiced in moderation" nor that "deception is permissible if practiced in small town newspapers of limited circulation" (RB 13-14), though the learned administrative law judge may be excused for having received the contrary impression. (I. D. p. 27) In all events the magnitude of the false advertising in this case cannot constitute an affirmative defense to the allegations of the complaint, nor does it give any reason to think that an order is not required to remedy the violation.

II. *Abandonment*

Respondent further argues that it abandoned the offending practice in late 1971. It was stipulated at trial that RCP advertising was discontinued at this time, following determination by respondent, in response to an advertising substantiation order served on it by the Commission, that claims for the uniqueness of RCP could not be substantiated. The Commission has been properly parsimonious, if not totally unyielding, in its adjudicative recognition of the defense of abandonment, and courts have been reluctant to vacate Commission orders on those grounds except in the most extreme circumstances not present here, such as where a corporate respondent had existed from the relevant line of business under circumstances in which re-entry seemed improbable. *National Lead Co. v. FTC*, 227 F. 2d 825, 839 *et seq.* (7th Cir. 1955), *reversed in other respects*, 352 U. S. 419 (1957). Certainly the mere discontinuance of an offending practice in the face of inquiry by a law enforcement agency can under no circumstances be argued to amount to a defense. It is undisputed that respondent did not discontinue the challenged advertising until it had received an Order to File Special

Report, requesting substantiation for the false representation. The situation is in essence no different from that in *Coro, Inc.*, 63 FTC 1164 (1963), *aff'd* 338 F. 2d 149 (1st Cir. 1964), *cert. denied* 380 U. S. 954 (1965), upon which the administrative law judge relied. While it is true that the mere issuance by the Commission of an advertising substantiation order is not meant to imply that the recipient is suspected of wrongdoing, it is also clear that an order to file this special report pursuant to Section 6(b) of the FTC Act is an investigatory tool of the Commission, just as much as a subjoena issued pursuant to Section 9 of the Act, and having received such an order Fedders' subsequent discontinuance can hardly be viewed as being borne of spontaneous recognition of the error of its ways. Respondent disseminated plainly false advertisements for at least two years, discontinuing them only upon discovering that at long last the government would be reviewing the claims. These circumstances are not such as can breed confidence that respondent may be relied upon in the future to regulate its own advertising when the government may again not be looking over its shoulder, without the encouragement of an order. And we find without merit the contention that the circumstances of discontinuance in this case should be consdered an affirmative defense to an otherwise plain violation of law.[4]

[4]It is also unclear, as the initial decision points out, to what extent respondent has actually managed to eliminate false claims of the sort challenged here from its advertising. (I. D. pp. 34-35.) It appears that in March 1974, an advertisement ran in *Newsweek* claiming "exclusivity" for a feature of respondent's "Climatrol" brand room air conditioner when in fact others of respondent's air conditioners possessed the same attribute. We do not think that this circumstance is essential to our finding that the abandonment defense must fail. It is, however, an additional ground for that conclusion, and suggests that even during the pendency of these proceedings, when respondent has had an unusual interest in avoiding repetition of false claims (to demonstrate the lack of necessity for an order) it has been unable to do so.

III. *Order*

The argument put forth most seriously by respondent concerns the scope of the order entered by the administrative law judge. Respondent objects to paragraph II of the order, which prohibits false performance claims, and to paragraph III, to the extent it requires maintenance of substantiating materials for performance claims. Respondent contends that the representation challenged in this case was not a performance claim at all, but only a uniqueness claim, and that the order should be no broader that paragraph I, which prohibits false uniqueness claims, while paragraph III should be modified to require maintenance of substantiation for uniqueness claims only.

We cannot agree that the false representations here in question dealt only with "uniqueness" and not "performance," nor do we believe that an order dealing only with uniqueness claims would be in the public interest or serve to prevent future occurrences of the sort involved here.

In claiming that only Fedders' air conditioners possessed RCP, respondent was clearly making a statement about the performance of its product, namely that this performance was unmatched. What rendered these false representations material in the eyes of consumers, and no doubt what led respondent to make them, was the message they conveyed about the relative performance of the product, and not merely the message of "uniqueness" in some disembodied sense.[5] An order addressed only to unique-

[5]Consider an advertisement for air conditioners that represented them to be unique because of being painted with red, white, and green stripes. Certainly the consumer would be left thinking that the advertised air conditioner was "unique," but the Commission might be at pains to show that such a claim was material, nor can we imagine a sane advertiser spending money to make it. Uniqueness is obviously both an attribute in itself and one facet of broader categories of product characteristics, such as price, performance, and warranty terms.

Final Order, Dated January 14, 1975

ness claims and not to performance claims would be inadequate to insure that the same species of misrepresentation as has here occurred will not happen again.

It remains then to consider the scope of the prohibition on false characterizations of performance. The administrative law judge and complaint counsel recommend a prohibition on misrepresentation of all performance characteristics. The performance characteristic in this case which was untruthfully and without reasonable basis represented to be unique involved air cooling capacity under conditions of extreme heat and humidity. In view of all the circumstances of this case, including the fact that only one performance characteristic was misrepresented, we believe that the order should be narrowed slightly to forbid only misrepresenttaions of performance characteristics of the general sort involved in the offending advertisements. An appropriate order is appended.

By the Commission.

January 14, 1975

Decision and Opinion of U. S. Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 104—September Term, 1975.

(Argued October 31, 1975 Decided January 21, 1976.)

Docket No. 75-4051

FEDDERS CORP.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Before:

MULLIGAN, OAKES and MESKILL,

Circuit Judges.

Petition to review cease and desist order issued by Federal Trade Commission against Fedders Corporation. Petitioner's claim is that the FTC order applies to unsubstantiated "performance" claims although its advertising was deceptive only insofar as it claimed "uniqueness."

Petition denied.

SYDNEY B. WERTHEIMER, New York, N. Y. (Jeffrey H. Schneider, Weisman, Celler, Spett, Modlin & Wertheimer, New York, N. Y., of counsel), *for Petitioner.*

DENNIS H. HYNES, Attorney, Federal Trade Commission (Robert J. Lewis, General Counsel, Gerald Harwood, Assistant General Counsel, Federal Trade Commission, of counsel), *for Respondent.*

OAKES, *Circuit Judge:*

Petitioner seeks review of a final order entered against it by the Federal Trade Commission. The order stems from an investigation and determination by the Commission that petitioner has made serious misrepresentations in the advertising claims it has used to promote sales of its air conditioning equipment. Specifically, the Commission found that Fedders has claimed in its advertising that its air conditioners are unique, because they have "reserve cooling power," a term which the parties agree was intended to imply an unusual ability to produce cold air under extreme conditions of heat and humidity. In fact, however, the Fedders conditioners had no objective technical advantage over the equipment manufactured by its competitors. Accordingly, the Commission concluded that petitioner was engaging in misrepresentations in its advertising in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. §45(a).[1] A cease and desist

[1]15 U.S.C. §45 provides in pertinent part:

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

. . .

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

order was entered by the Commission which prohibits Fedders from:[2]

1. Representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any material respect, unless such is the fact;

2. Making, directly or indirectly, any statement or representation in any advertising or sales promotional material as to the air cooling, dehumidification, or circulation characteristics, capacity or capabilities of any air conditioner, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which shall consist of competent scientific, engineering or other similar objective material or industry-wide standards based on such material. . . .

Review is sought here under 15 U.S.C. §45(c).

[2]Other provisions of the Commission's order require the petitioner to maintain records available for FTC staff inspection which show the documentary materials in support of any claim disseminated in Fedders advertising concerning "the air cooling, dehumidification, or circulation characteristics, capacity, or capability of, or the uniqueness of any feature of, any of respondent's air conditioners." The order was issued on January 14, 1975, and is to be in effect for a period of ten years.

Fedders does not challenge the Commission's finding that Fedders' advertising involved misrepresentations.[3] Instead, it contends that the Commission's order is impermissibly broad in that it prohibits practices which are not sufficiently related to the unlawful practice actually found by the Commission and that these practices are, therefore, outside the proper scope of the Commission's remedial order. See *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946); *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933). More specifically the claim is, as it has been all along,[4] that the order appealed from covers not only "uniqueness" claims of the type which has been found false by the administra-

[3]There were in fact three misrepresentations found by the Commission, none of which are challenged here: (1) that "reserve cooling power" is a unique feature of the Fedders room air conditioners; (2) that Fedders room air conditioners compared with all other conditioners have a significantly increased cooling capacity at high loading conditions under customary use; and (3) that Fedders had a reasonable basis for concluding that compared with all other room air conditioners its product had that increased cooling capacity.

As will be discussed in the text below the Commission also found that

> [i]n claiming that only Fedders' air conditioners possessed RCP, respondent was clearly making a statement about the performance of its product, namely that this performance was unmatched. What rendered these false representations material in the eyes of consumers, and no doubt what led respondent to make them, was the message they conveyed about the relative performance of the product, and not merely the message of "uniqueness" in some disembodied sense.

[4]The Commission in its original complaint set forth an order which it had "reason to believe should issue" if the facts were found as indeed they were. Paragraph 4 of this draft order forbade any performance claims unless substantiated and from its initial answer petitioner has objected to any restriction on "performance" claims. Paragraph 2 of the administrative law judge's order applied to any and all unsubstantiated performance claims but the Commission's final order, set forth in the text at footnote 2, limited this paragraph to performance claims relating to "air cooling, dehumidification, or circulation characteristics."

tive law judge, but also covers advertising claims with respect to "performance characteristics" of the product, *i.e.*, air cooling, dehumidification and circulation, which Fedders claims were not involved in the FTC proceeding. Since Fedders quite properly agrees that the Commission has the power within its discretion to enjoin "like and related acts" to the one condemned, *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 393 (1959), the question before us is whether the Commission's order is sufficiently narrow to come within that standard. We hold that it is and deny the petition for modification of the order.

There is much broad language in the cases that the Commission has a wide discretion in its choice of a remedy to "cope with the unlawful practices" disclosed by the record. *Id.* at 392; *Jacob Siegel Co. v. FTC, supra*, 327 U.S. at 611. The Commission

> is not limited to prohibiting "the illegal practice in the precise form" existing in the past. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 [1952]. This agency, like others, may fashion its relief to restrain "other like or related unlawful acts." *Labor Board v. Express Pub. Co.*, 312 U.S. 426, 436 [1941].

FTC v. Mandel Bros., Inc., supra, 359 U.S at 392. "One cannot generalize as to the proper scope of these orders. It depends on the facts of each case and a judgment as to the extent to which a particular violator should be fenced in." *Id.* Congress has placed the primary responsibility for fashioning orders upon the Commission, and for this reason the courts should not lightly choose to modify the Commission's orders. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *FTC v Cement Institute*, 333 U.S. 683, 726 (1948). So long as the remedial order is reasonably related to the unlawful practices found to exist, the Commission's order should be upheld. *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957); *Hoving Corp. v. FTC*, 290 F. 2d 803, 806 (2d Cir. 1961).

At the same time we take full cognizance of the petitioner's point that, as we expressed it in *Country Tweeds, Inc. v. FTC,* 326 F. 2d 144, 149 (2d Cir. 1964), the overall concept of "reasonableness" has required the narrowing of deceptive advertising orders so that they more closely relate to the offending co. duct while "still sufficiently prohibiting 'variations on the basic theme.'" *See Vanity Fair Paper Mills, Inc. v. FTC,* 311 F. 2d 480, 487 (2d Cir. 1962). *See also Spiegel, Inc. v. FTC,* 411 F. 2d 481 (7th Cir. 1969). Mr. Justice Jackson's admonitions in his *Ruberoid* dissent, 343 U.S. at 480 *et seq.,* have not gone unheeded in the courts. And we are fully aware of the suggestion in *FTC v. Henry Broch & Co.,* 368 U.S. 360, 367-68 (1962), reiterated in *FTC v. Colgate-Palmolive Co., supra,* 380 U.S. at 392, that the stiff penalty procedures under §45(*l*), *see Brown & Williamson Tobacco Corp. v. FTC,* No. 75-6081 (2d Cir. Dec. 22, 1975), slip op. 1187, may well require a more specific and precise order than would have been necessary prior to the enactment of those penalties in 1959.[5] We note, however, that no problem of lack of specificity or precision in the order is involved here. Fedders' argument is that a false "performance" claim is not simply a "variation upon the basic theme" of a false "uniqueness" claim. A performance misrepresentation, the argument runs, is an offense so distinct from and so much greater than a false claim of uniqueness as not to be "like or related."

There is no dispute that paragraph 1 of the Commission's order is reasonably related to the unlawful misrep-

[5] *See United States v. J. B. Williams Co.,* 498 F. 2d 414 (2d Cir. 1974), for the statutory scheme regarding penalties.

Professor Jaffe attributes the *Vanity Fair* and *Country Tweeds* modifications of FTC orders to the suggestion in *FTC v. Henry Broch & Co.,* 368 U. S. 360 (1962). *See* L. Jaffe, Judicial Control of Administrative Action 316-18 (1965).

resentations Fedders has engaged in. Ordering Fedders to cease and desist from making claims that its air conditioners are "unique in any material respect, unless such is the fact," is obviously directly responsive to the Commission's finding that Fedders' claim that its products possessed a "reserve cooling power" was a spurious claim of unique product quality. Petitioner properly concedes that the Commission has authority "to frame its order broadly enough to prevent [the petitioner] from engaging in similarly illegal practices in future advertisements." *FTC v. Colgate-Palmolive Co., supra,* 380 U.S. at 395. Clearly, paragraph 1 of the order in this case was made well within that authority.

Paragraph 2 of the FTC order, we think, stands on no different footing. This part of the order, which forbids petitioner from making advertising claims as to the "air cooling, dehumidification, or circulation characteristics, capacity or capabilities of any air conditioner" unless substantiated is also reasonably related to the prior misrepresentations which Fedders employed in its sales program. The false claim made by Fedders that its air conditioners possessed "reserve cooling power" implied that some feature of the cooling, dehumidifying or circulation systems of the equipment allowed them to perform better than other air conditioners would at extreme temperature and humidity conditions. That is to say, the vague design claim relating to a reserve cooling power implicated the basic performance characteristics of the entire product. The administrative law judge put it somewhat confusedly when he said that "Respondent has admitted disseminating a false performance claim for its room air conditioners relating to the uniqueness of the ability of its room air conditioners to function satisfactorily at conditions of extreme heat and humidity." The respondent, petitioner here,

made no such admission but rather admitted only false claims of uniqueness, the only deceptions charged in the complaint. But as the Commission held, note 3 *supra,* the claim of uniqueness in having "reserve cooling power" was also a performance claim by implication. "Uniqueness," as the Commission footnoted, "is obviously both an attribute in itself and one facet of broader categories of product characteristics, such as price, performance and warranty terms."

As to this finding, that the uniqueness claim as to reserve cooling power implies to consumers a claim of high cooling performance in extreme conditions of heat and humidity, we are in the very realm of the Commission's greatest expertise—what constitutes deception in advertising. *See United States v. J. B. Williams Co.,* 498 F. 2d 414, 445 (2d Cir. 1974) (dissenting opinion). As such the reviewing court must give the Commission's findings "great weight." *See FTC v. Colgate-Palmolive Co., supra,* 380 U.S. at 385. On the basis of this finding of implicit misrepresentation the remedial order appears sound as reasonably related thereto. *National Dynamics Corp. v. FTC,* 492 F. 2d 1333, 1336 (2d Cir.) (per curiam), *cert denied,* 419 U.S. 993 (1974). By limiting the order to unsubstantiated representations as to "cooling, dehumidification, or circulation characteristics, capacity or capabilities," as opposed to the administrative law judge's proscription as to "any" performance characteristic, which would include energy usage, durability or quietness, for example, the Commission has done the necessary limitation which reasonableness would require. More than this a reviewing court may not direct.

Fedders makes two additional arguments bearing upon the scope of the Commission's order, but these are subject to speedy disposition. Petitioner argues that since the unlawful acts complained of had been discontinued prior to the filing of the Commission's complaint, its cessation of the offending activity, combined with its written assurance that it will not again resume it, weighs in favor of limiting the order. *See Country Tweeds, supra,* 326 F. 2d at 149. The fact that Fedders may have discontinued the offending practice before the Commission issued the complaint in this case, however, does not bar a cease-and-desist order, where the public interest otherwise requires it. *Diener's, Inc. v. FTC,* 494 F. 2d 1132, 1133 (D.C. Cir. 1974) (per curiam); *Cotherman v. FTC,* 417 F. 2d 587, 595 (5th Cir. 1969); *Libby-Owens-Ford Glass Co. v. FTC,* 352 F. 2d 415, 418 (6th Cir. 1965). Furthermore, the term "reserve cooling power" had been used in Fedders advertising for six or seven years—the claims were described in a bulletin to its distributors as "[o]ld powerful selling friends." These were not, then, merely casual advertising claims. Their discontinuance, the administrative law judge found, was not a "voluntary action" but came about as a result of Fedders' "awareness of the Commission's investigation of its advertising." The propriety of the order, under the case law, cannot be challenged. *Coro, Inc. v. FTC,* 338 F. 2d 149, 153 (1st Cir. 1964), *cert. denied,* 380 U.S. 954 (1965); *Galter v. FTC,* 186 F. 2d 810, 812-13 (7th Cir.), *cert. denied,* 342 U.S. 818 (1951).

Fedders also claims that the Commission's order is overly broad because it is not, by its terms, limited to objective representations of uniqueness or performance characteristics but also prohibits subjective product claims which are, by definition, incapable of being proven by "scientific or engineering" data. But we do not read the order to have intended the restriction suggested by petitioner. It is only the claim which fairly, if not necessarily, implies some underlying objective basis which the order reaches. We would not hamstring the Commission by reading its order to apply only to "objective" claims, since it is the impliedly as well as actually objective assertions which effect the deception the Commission is attempting to forestall. On the other hand, we need not and do not consider, in the

light of the proceeding below, *see Swift & Co. v. United States,* 393 F. 2d 247, 256 (7th Cir. 1968), that the order was aimed at the *purely* subjective arguments which merchants sometimes indulge in while hawking their wares.[6] The Commission order may not be construed to have intended to restrict petitioner by requiring objective data to support purely subjective claims; absent an aura of underlying objective support suggested by the advertisement when viewed as a whole. If there is any uncertainty in the application of this order to the petitioner, the uncertainty may be resolved under the Commission's Rules of Practice which permit petitioner to ascertain in advance whether a particular advertising claim comes within the scope of the order, 16 C.F.R. §§ 3.61(d), (e). *FTC v. Colgate-Palmolive Co., supra,* 380 U.S. at 394; *Vanity Fair Paper Mills, Inc. v. FTC, supra,* 311 F. 2d at 488.

Petition dismissed.

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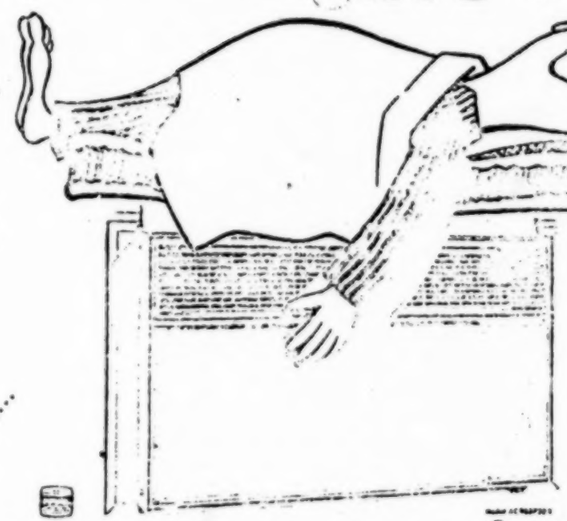
[6]The Commission, in its brief, has admitted that "to the extent that Fedders makes claims that are solely subjective for their product, there is no need for substantiation."

Copies of Five Advertisements Referred to in Petition.

(See opposite page.) ☞



Community Newspapers
14 ads; Beginning
5-14-70

FEDDERS (8,000 BTU'S)

CALL US FOR OUR LOW LOW PRICE

Ideal for master bedrooms and moderate-size living rooms

- PICK IT OFF THE SHELF
- PACK IT IN YOUR CAR
- TAKE IT OUT OF CARTON
- PLACE IT IN YOUR WINDOW
- PULL OUT FLEX-MOUNT SIDES
- PLUG INTO ADEQUATE 115-VOLT CIRCUIT

AH...COOL, QUIET SLEEP...IT'S WONDERFUL

This special Fedders 75th Anniversary commemorative air conditioner is easily installed in regular and narrow double-hung windows, and fits sliding windows, too, with optional mounting kit. Great features include famous Sound Barrier design, handsome walnut-finish front, adjustable automatic thermostat, Hi and Lo Cool, exclusive Reserve Cooling Power*, directional control of air, totally enclosed zinc-clad steel cabinet. You get quality inside and out . . . Fedders wouldn't let you have it any other way.

*Special Fedders 75th Anniversary commemorative model compared to comparable capacity standard Fedders model.

FEDDERS—world's largest selling air conditioners

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79a2
(1)

2-21

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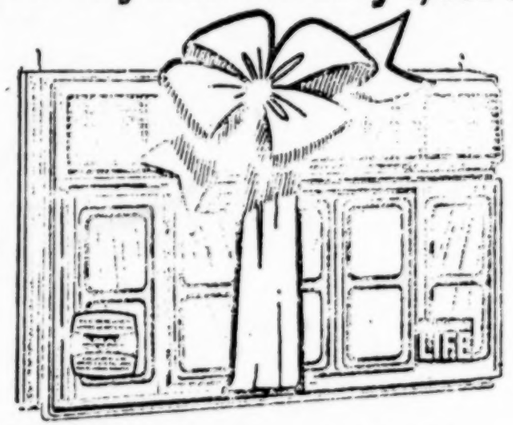
Save $40 if you buy before May 1, 1971



15,000 BTU's
operates on both 230 and 208 volts

only $229.95

reg. $269.95
Model ACT15F7EY

Count on really great multi-room cooling and count up the big savings, too. This special Fedders Red Ribbon air conditioner is only 24" wide — packs more comfort for its size than any air conditioner made. Cools large open-plan living dining areas — even an entire floor of a modest home. Cools quietly too, thanks to Sound Barrier design, Fedders *total* approach to sound control. This is the pre-season air conditioner value of the year. Get this famous Fedders today, pocket the savings, and look forward to the most refreshing summer of your life.

- Quiet Sound Barrier Design
- Hand-crafted appearance; concealed controls
- Super Cool and ultra-quiet lo
- Automatic precision thermostat
- Fingertip variable air direction
- Flex-Mount pull-out sides
- Washable germicidal filter
- Powerful dehumidification
- Exclusive Reserve Cooling Power
- Totally enclosed-zinc clad cabinet

Other Great Red Ribbon Values

7,000 BTU's
115 volts, 7.5 amps
only $179.95
reg. $209.95
for master bedrooms, other medium-size rooms
Model AST07F2EY

11,000 BTU's
115 volts, 12 amps
only $219.95
reg. $259.95
for large areas, even two rooms
Model ACT11F2EY

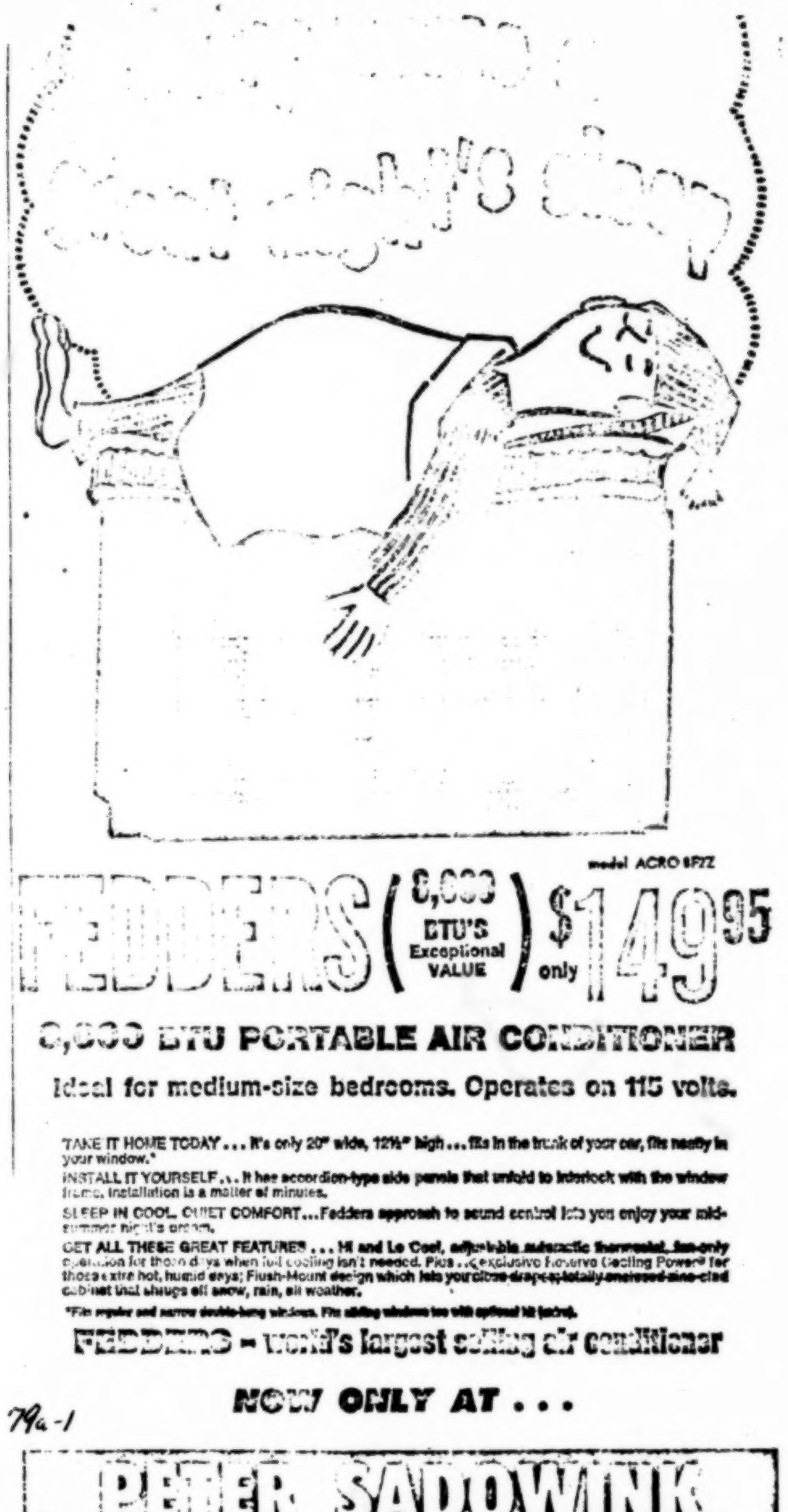
Leon's
House of Air Conditioning

FEDDERS
World's Largest Selling Air Conditioners

79a-Jun
(2)

ST. Petersburg Independent 1 ad 4-22-71 (t)

Phila 69-70



Philadelphia Inquerer

6 Ads Begining 5-28-70

79a-1

2-22

②

TABloid 1 insertion 5-17-71

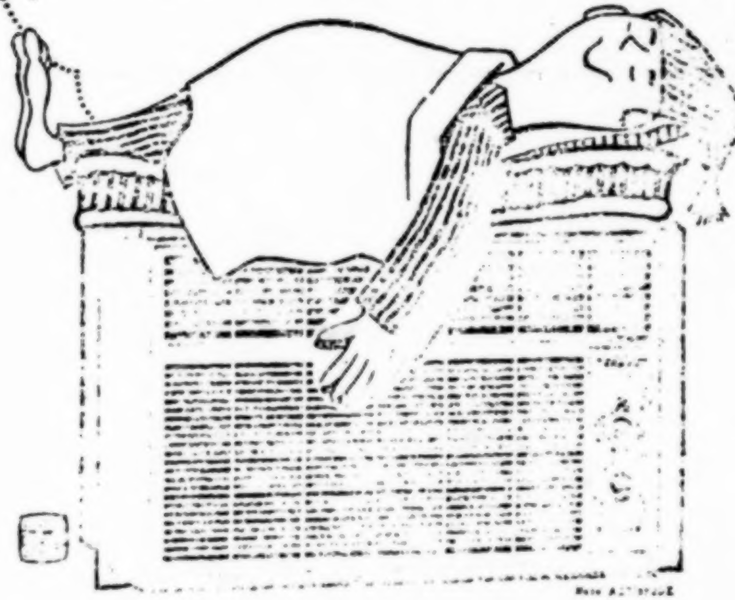
79a-3

⑤

2-39

1969 MODELS
ONLY A FEW LEFT
SAVE $20 TO $50

carry home a
Great night's sleep



FEDDERS (6,000 BTU'S Exceptional VALUE) ALL SIZES IN INVENTORY

6,000 BTU PORTABLE AIR CONDITIONER

Ideal for medium-size bedrooms. Operates on 115 volts.

FEDDERS – world's largest selling air conditioner

St. Petersburg Times 1 AD 5-4-70

79a-4

(313)

(9)

BEST COPY AVAILABLE

No. 75-1508

In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDDERS CORPORATION,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

THOMAS E. KAUPER,
Assistant Attorney General,

BARRY GROSSMAN,
Attorney,
Department of Justice,
Washington, D.C. 20530.

ROBERT J. LEWIS,
General Counsel,

GERALD P. NORTON,
Deputy General Counsel,

GERALD HARWOOD,
Assistant General Counsel,

DENIS E. HYNES,
Attorney,
Federal Trade Commission,
Washington, D.C. 20580.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 69a-78a) is reported at 529 F.2d 1398. The order and opinion of the Federal Trade Commission (Pet. App. 58a-68a) and the initial decision and order of the administrative law judge (Pet. App. 16a-57a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1976. The petition for a writ of certiorari was filed on April 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a Federal Trade Commission order prohibiting any misrepresentation with respect to the air

cooling, dehumidification or circulation characteristics, capacity or capabilities of air conditioners was reasonably related to the Commission's finding that petitioner had misrepresented that its air conditioners were superior in cooling capacity to other air conditioners.

STATUTE INVOLVED

Section 5(a) and (b) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(a) and (b),[1] provide in part:

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> * * * * *
>
> (b) * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall * * * issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.

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[1]Section 5(a)(1) and (6) have been amended to apply to conduct "affecting" as well as "in" commerce (see 15 U.S.C. (Supp. IV) 45(a)(1) and (6)), but this case is based on the law as it stood prior to the amendment.

STATEMENT

In June 1973, the Federal Trade Commission issued a complaint alleging that petitioner, a corporation engaged in the sale of home air conditioners, had engaged in unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act (Pet. App. 1a-9a). The administrative law judge determined that petitioner had violated the Act by falsely representing in its advertising that "only" Fedders had "reserve cooling power," a feature stipulated to be the capacity to cool efficiently at times of high heat and humidity. Moreover, the judge found that through such advertising petitioner misrepresented directly or by implication that its air conditioners had a "significantly superior ability to function satisfactorily under conditions of extreme heat and humidity" (Pet. App. 52a-54a).

The judge ordered petitioner to cease and desist from misrepresenting any performance attribute of the products it sold or offered for sale (Pet. App. 55a-57a). On appeal, the Commission adopted the opinion of the administrative law judge but modified the order by prohibiting misrepresentation of only the air cooling, dehumidification or circulation characteristics of air conditioners (Pet. App. 58a-68a).

The court of appeals affirmed and enforced the Commission's order (Pet. App. 69a-78a). The court sustained the Commission's finding that the explicit claim of uniqueness also implicitly represented the performance characteristics of the products, and held that the Commission had properly prohibited misrepresentations that were implicit in, and hence reasonably related to, the false claim explicitly made (Pet. App. 76a).

ARGUMENT

1. Petitioner acknowledges that the Commission has discretion to "fence in" one found to have engaged in a wrongful practice by prohibiting other conduct having

a "reasonable relationship" to such wrongful practices (Pet. 6, 12). See generally *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392-395; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-431; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611-613. Thus, as petitioner concedes, the only question concerns "the application of" settled principles governing the permissible scope of Commission orders (Pet. 6) to the particular facts of the case. The court of appeals affirmed the Commission's exercise of its broad remedial discretion, and this narrow question does not warrant further review.

2. In any event, the court of appeals was correct in sustaining the Commission's order. Petitioner claims in essence that it misrepresented only the uniqueness and not the actual performance characteristics of its products, and that the Commission's remedial powers are, therefore, limited to prohibiting misrepresentation of uniqueness (Pet. 7-10). But its claim of unique cooling power implies to consumers superior ability to perform. Limiting the Commission's remedial power on the basis of semantic distinctions between claims of uniqueness and claims of performance would seriously circumscribe the Commission's ability to provide practical protection for consumers under Section 5 of the Federal Trade Commission Act.

A consumer may be as deceived by misrepresentations that an asserted characteristic is unique as by representations that a product has a characteristic which in fact it does not. Cf. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, *supra*, 380 U.S. at 380, 389. As the court of appeals noted, such a conclusion is "in the very realm of the Commission's greatest expertise—what constitutes deception in advertising" (Pet. App. 76a). The Commission

acted well within its discretion in concluding that such representations are reasonably related and that, having engaged in one form of such misrepresentation, petitioner should be restrained from engaging in such others. "[T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past" (*Federal Trade Commission* v. *Ruberoid Co.*, *supra*, 343 U.S. at 473).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

BARRY GROSSMAN,
Attorney.

ROBERT J. LEWIS,
General Counsel,

GERALD P. NORTON,
Deputy General Counsel,

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Attorney,
Federal Trade Commission.

JUNE 1976.

DOJ-1976-06

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OCTOBER TERM, 1975

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER, FEDDERS CORPORATION

SYDNEY B. WERTHEIMER
JEFFREY H. SCHNEIDER
Attorneys for Petitioner
425 Park Avenue
New York, N. Y. 10022

WEISMAN, CELLER, SPETT, MODLIN,
WERTHEIMER & SCHLESINGER
Of Counsel

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ARGUMENT

Commission counsel contend (Resp. 4-5) that the Commission "acted well within its discretion" in concluding that any representation as to any one of a broad spectrum of performance characteristics of Fedders air conditioners (to wit, their air cooling, dehumidification, and circulation capabilities) is necessarily "reasonably related" to a representation concerning only the *uniqueness* of a single, narrow performance characteristic (to wit, "reserve cooling

power"). This contention is based upon the following two grounds (Resp. p. 4):

(1) "[Petitioner's] claim of unique cooling implies to consumers a superior ability to perform."; and

(2) "A consumer may be as deceived by misrepresentations that an asserted characteristic is unique as to representations that a product has a characteristic which in fact it does not. Cf. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. at 380, 389."

The second ground is obviously irrelevant to the issues here involved. No one challenges that a false uniqueness claim is capable of deceiving a consumer.

As to the first ground, it is true that the Court of Appeals sustained (Pet. App. 76 a) the Commission's finding that "the claim of uniqueness in having reserve cooling power was also a performance claim by implication". However, we respectfully submit that the learned Court erred in sustaining this finding, which is in the nature of a conclusion rather than a factual finding. Fedders, throughout these proceedings, has painstakingly demonstrated (Pet. 9-10) the wide difference, not only semantically but in nature and effect, between falsely claiming that a truthfully asserted performance attribute is unique to the advertiser's product and claiming a performance attribute which the product does not possess at all. Only in the very loosest semantic sense—the very sense which Commission counsel derides—can a claim of uniqueness be considered a performance claim.

The decisions of the Commission and of the Court below were not responsive to Fedders' exposition of these marked differences. But, as hereinafter set forth, this Court, in a different but analogous framework, has recognized dis-

tinctions strikingly similar to those which the Commission and the Court of Appeals saw fit to ignore in the case at bar.

Commission counsel have stressed *Federal Trade Commission* v. *Colgate-Palmolive,* 380 U.S. 374, in support of their position, and in particular, the language of this Court at 380 U.S. 389. That segment of the *Colgate-Palmolive* opinion concerns itself with the question of whether the use of a "mock-up" in television commercials of a shaving cream, without disclosing that it is a mock-up, constitutes a misrepresentation separate from a [redacted] *concededly false* performance claim made in the same commercials, to wit, a misrepresentation as to the moisturizing power of the product.* This Court decided that it was, saying:

> ". . . the undisclosed use of plexiglas in the present commercials was a material deceptive practice, independent and separate from the other misrepresentation found." (380 U.S. at 390).

Since the inclusion in the Commission's order against *Colgate-Palmolive* of a proscription against misrepresenting the moisturizing properties, or other performance characteristics, of its shaving cream product had the solid basis of a concededly false performance claim as to the moisturizing power of the product, it is plain that *Colgate-Palmolive* did not, in any way, sanction the Commission's

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* In the subject commercials the announcer informed the viewers that "To prove RAPID SHAVE'S super-moisturizing powers, we put it right from the can onto this tough, dry sandpaper. It was apply . . . soak . . . and off in a stroke." A visual demonstration accompanied this statement. The evidence revealed that the sandpaper depicted could not be shaved immediately following application of Rapid Shave but required a substantial soaking period. The evidence further revealed that what was purported to be sandpaper in the commercials was in fact a "mock-up" made of plexiglas to which sand had been applied. (380 U.S. at 376).

promulgation of an order embracing performance claims in a situation, like that in the case at bar, where the only proven violation is in respect to a non-performance claim.

We submit that if *Colgate-Palmolive* had not involved a concededly false performance claim as well as the use of a deceptive mock-up device, this Court would have narrowed the prohibitions of the order to the use of undisclosed mock-ups and regarded performance claims as not "reasonably related" thereto. The language of the Court in *Colgate-Palmolive*, at 380 U.S. 388, demonstrates the clear and basic difference between the two types of representations. At that point, citing a number of cases in support of its conclusions that the use of an undisclosed mock-up in a television commercial was a material deceptive practice, the Court stated that:

> ". . . all of the [cited] cases like the present case *deal with methods designed to get a consumer to purchase a product,* not with whether the product, when purchased, will perform up to expectations." (380 U.S. at 388). (Emphasis added).

The methods used in the cited cases "to get a consumer to purchase a product" include the misuse of a trade name (*F.T.C.* v. *Algoma Lumber Co.*, 291 U.S. 67, *F.T.C.* v. *Royal Milling Co.*, 288 U.S. 212, and *Howe* v. *F.T.C.*, 148 F.2d 561 (9th Cir. 1945), *cert. den.*, 326 U.S. 741) and the misappropriation of the Good Housekeeping Seal of Approval (*Niresk Industries Inc.* v. *F.T.C.*, 278 F.2d 337, (7th Cir. 1960), *cert. den.*, 364 U.S. 883). It is noteworthy that in none of these cases was the respective cease and desist order extended to any performance claims (*i.e.*, any claim that the product would "perform" up to a particular "expectation").

A false claim as to the uniqueness of a particular performance characteristic, like the wrongful use of a mock-up device, or of a trade name, or of the Good Housekeeping Seal of Approval, is a misrepresentation "designed to get a consumer to purchase a product" and not a misrepresentation as to "whether the product, when purchased, will perform up to expectations". Furthermore, not only is the uniqueness misrepresentation in the case at bar, as aforesaid, clearly conceptually different from a false performance claim, but is so different in its effect upon the consumer (Pet. 9-10), that the two types of claims can not be said to constitute "like and related" practices. Accordingly, basic fairness and equity demand that the scope of the order in the case at bar be limited to violations of the same *genre*, namely, uniqueness.

The order promulgated against Fedders is comparable in its scope to the *Colgate-Palmolive* order. Both orders encompass the deceptive non-performance practice engaged in by the respective respondents (use of undisclosed mock-ups by Colgate-Palmolive and false uniqueness claim asserted by Fedders). Similarly, each of these orders contain a proscription against the making of certain false performance claims (in *Colgate-Palmolive*, it was the moisturizing capabilities of its shaving creams; in the case at bar, it is the air cooling, circulation and dehumidification performance of Fedders' air conditioners). However, while *Colgate-Palmolive* in fact involved a false claim as to the moisturizing power of one of Colgate-Palmolive's shaving creams, in the case at bar there was no false claim whatever made as to the air cooling, circulation or dehumidification performance of Fedders' products.

In short, Fedders has been "fenced in" to the same extent as Colgate-Palmolive but for violations of the law substantially less comprehensive. There is, therefore, an evident need for this Court to define the boundaries of the doctrine of "like and related" practices as applied in deceptive advertising cases. The case at bar presents the opportunity for this Court to do so.

CONCLUSION

Fedders' Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SYDNEY B. WERTHEIMER
JEFFREY H. SCHNEIDER
Attorneys for Petitioner

WEISMAN, CELLER, SPETT, MODLIN,
WERTHEIMER & SCHLESINGER
Of Counsel